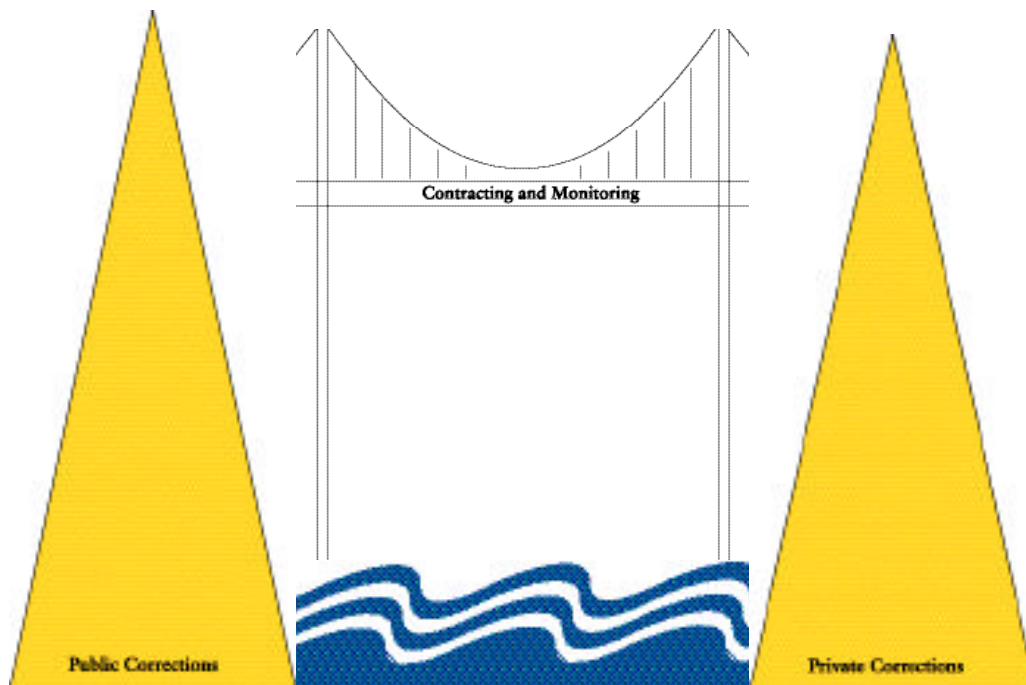
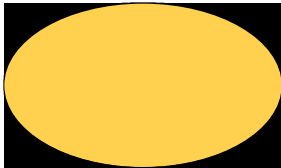
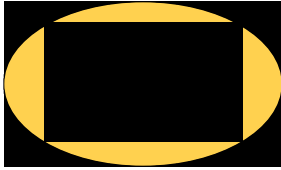


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ASCA Resource Committee on Privatization Issues

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I. Introduction: general overview

While Departments of Corrections have contracted with private agencies for inmate beds for decades, these contracts have typically been for halfway house type beds and the contracts were with small not-for-profit organizations. When compared to the cost of operating a major prison, these agreements did not involve particularly large sums of money. Since they were made primarily with voluntary organizations, “profit” was rarely an issue.

All this changed in the mid-1980s when “privatization” in the form of state departments of corrections contracting for prison beds operated by large for-profit corporations suddenly burst upon the corrections scene. These companies offered to design, build and operate large prisons. In one case, Tennessee, a private company proposed to take over the state’s entire prison system. The attempt to convince the state to contract out operations of its entire system failed, although the state does currently contract for some beds. Even as private companies claimed they could operate correctional facilities more cheaply and efficiently than the public sector, initially, few state correctional agencies welcomed private prison companies or sought their services.

Despite the early lack of enthusiasm among corrections professions for private prisons, most states ultimately did buy into some form of privatized correctional operation, and by the mid-1990s, the private prison movement had become an important aspect of American corrections and indeed, around the world. By the end of 1999, the rated capacity of private secure adult correctional facilities in operation or under construction in the U.S., including beds in prisons, jails, and immigration facilities, was more than 122,000.¹ Many of the private companies also operate juvenile facilities. The largest two private corrections companies each operate more custodial beds than most state Departments of Corrections. Private prisons also operate overseas, at least in the U.K., Australia and South Africa.

Controversial or not, private prisons have become a significant part of the American correctional scene and, for some states, as a source of a substantial number of beds. The impetus for contracting may come from a Department of Corrections searching for a solution to a crowding problem. Or it may come from state policymakers who believe taxpayers will pay less for private beds than public beds. Regardless of who originally initiated the drive to privatize, or the reasons behind it, many states are currently contracting for private beds, and it is likely that still more will face the contracting decision in the future.

¹ <http://web.crim.ufl.edu/pcp/census/1999/Figure1.html>.

This manual on corrections contracting, along with its companion on the monitoring of private correctional contracts, were commissioned by the Corrections Program Office of the Office of Justice Programs, United States Department of Justice to address the need and desire of correctional administrators for the guidance of their colleagues who have experienced the challenges involved in soliciting, contracting and monitoring private corrections contracts. It is meant to impart the practical, “hands-on” aspects of the corrections contracting experience so those who are just embarking on dealing with private corrections can take advantage of the experience and expertise of those who have been there and done it — some of them many times before.

The contents of this manual come from many sources well beyond the author’s own experience. The author had the benefit of reviewing numerous sample contracts and Requests for Proposals (RFPs), and answers to surveys from both public and private agencies added valuable information and guidance. The members of the Privatization Issues Sub-committee of the Association of State Correctional Administrators, which is comprised of corrections’ Directors and their designees from both state and federal agencies, substantially guided the development of this manual and reviewed multiple drafts of the documents and offered very constructive suggestions. To the degree it is useful, the credit goes to them.

* * *

II. Scope of the Manual

In the traditional Department of Corrections, the agency Director maintains considerable power over the operation of individual institutions, which are managed and operated by civil servants directly or ultimately responsible to the Director. In such departments, wardens and other staff may often serve at the pleasure of the Director, who in turn serves at the pleasure of the Governor. The traditional Director is typically empowered to change policies and operating philosophies sometimes on little more than whim. The governor can do likewise, and, if so desired, change Directors at the same time.

In the case of the private correctional facility, however, such power relations do not necessarily hold. The powers and authority the Director has over the private prison do not flow directly from the laws that define the powers of the agency Director. Rather, they are defined by the contract between the public agency and the private prison operator. It is within the four corners of the contract that the respective powers and duties of the private contractor and public agency are defined. The agency Director who does not understand this may find him or herself with more obligations and/or fewer powers than he or she wants or needs.

Agency administrators who fail to recognize the most critical aspects of the contractual relationship, or who simply overlook and consequently fail to address important issues in the contract, may face serious operational difficulties during the life of the contract. When a contract does not speak to critical issue “X,” or fails to address such an issue completely, the administrator may be unable to force the contractor to follow the administrator’s wishes on such an issue. While the administrator want to amend the contract to meet the newly realized desires, the contract will have to be renegotiated, which requires the agreement of both parties. If the administrator wants new obligations to be added, the private company may agree only if new funds are provided to the contract to pay the costs of the added obligations.

Relying on American Correctional Association (ACA) Standards in constructing a contract can help administrators identify issues that should be included in the contract, but reliance on ACA standards alone will not guarantee that all of the detail and nuance that an administrator will want to include will indeed be incorporated in the contract.

A successful privatization contract begins with a well-drafted contract, which in turn begins with a comprehensive, well-drafted Request for Proposal (RFP). While a poorly drafted contract may certainly increase the possibility of a poor contracting experience for the correctional agency, the best drafted contract will not guarantee a successful contracting experience any more than a superbly drawn set of policies and procedures assures a well run prison. Monitoring the private company’s compliance with the contract and having an effective means of enforcing compliance with the requirements of the con-

tract is ultimately the key to a successful contracting experience. This document focuses on the drafting of the RFP and the subsequent contracting process. A companion document, *Monitoring Correctional Services*, discusses monitoring issues.

These pages focus primarily on the situation in which the Department of Corrections is contracting with a private provider whose facility is located within the state where the Department is also located, and where the Department will provide essentially all of the inmates to be housed in the facility. To a lesser extent, it will discuss issues relating to the situation where the provider is located in another state and the situation where the facility houses inmates from more than one jurisdiction.

In preparing this manual, questionnaires were sent to state departments of correction.² Questionnaires were also sent to major private prison companies. The responses to both questionnaires served as an important source of information for this manual and are reflected in the text. States were asked questions regarding the origins of their decision to contract; who participated in drafting their RFP; the extent to which it was original work or drew from the work of other jurisdictions; and whether and how the process could be improved. Questions were also asked about the evaluation, selection, and contract drafting processes.

The questionnaire sent to private providers was somewhat different. It asked how the contractor selection process could be improved; how an RFP could be drafted to elicit the best responses; what positive steps a jurisdiction could take in drafting and negotiating a successful contract; what a reasonable amount of time to respond to the RFP might be; and what their experience was with ramp up time and various pricing schemes.

The discussion of contracting and contract monitoring that appears in these pages was guided and supported by information provided by the Correctional Programs Office, Office of Justice Programs, United States Department of Justice and the Association of State Correctional Administrators (ASCA). It was through the leadership and involvement of these organizations that this project took root, grew, and flowered.

* * *

² Jurisdictions responding to the survey included Alaska, Arizona, the Federal Bureau of Prisons, Connecticut, Delaware, Idaho, Iowa, Louisiana, Michigan, New Mexico, North Dakota, Oklahoma, Tennessee, Texas, Washington, and West Virginia.

III. The Decision to Contract

The impetus for contracting for prison beds may or may not originate with the Department of Corrections. Even though an agency may not be considering privatizing prison beds and may even be philosophically opposed to the concept, others may make the decision for it such as the state legislature or the governor's office. Other circumstances, such as the need to bring new prison beds online quickly, may compel an agency to look to the private sector.

Addressing crowding problems is the most common reason agencies turn, or are turned, to contracting. Depending on the seriousness of crowding pressures, the speed with which a private company can bring beds on line may take on greater influence and importance as agencies, legislative, and executive branch leaders consider prison bed expansion options. Some prison companies have built what amounts to "spec prisons," facilities begun without a guaranteed source of inmates to fill them. Spec prison beds may be almost immediately available to an agency.

One price the agency using "spec beds" may pay is reduced control over operations of the private prison. While the Department that contracts for all the beds at a private prison may be able to insist upon exclusive control over the operation of the facility, the Department that rents beds from a private spec prison that rents beds to several other customers is likely to forfeit exclusive control. Beds at such facilities tend to be available on a "take them or leave them" basis.

Some state administrators report that their decision to contract arose from a need to deal with special populations. One jurisdiction saw contracting as a means of providing housing for violent youthful offenders convicted as adults. The Federal Bureau of Prisons houses sentenced criminal aliens exclusively at private facilities.

The notion that privatizing prison beds will save the jurisdiction money is often a strong motivating factor. Whether private sector corrections can indeed operate a prison significantly cheaper than the public sector, assuming the two facilities are comparable, remains subject to debate.³

Another factor that agencies noted as influencing the decision to privatize included the perception that private prison operators have greater flexibility in managing and operating prisons, and therefore can operate them more effectively and efficiently than their state agency counterparts. Private prison advocates argue, for instance, that private facilities are not constrained by government red tape in such areas as purchasing and personnel. The relative effectiveness and efficiency of private versus public prisons is still a matter of debate.

* * *

³ See <http://www.ucc.uconn.edu/~wwwsoci/fraser.html#ToC2>.

IV. The Request for Proposal: importance and contents

A strong contract begins with a strong Request For Proposal (RFP). The responses the document produces become the basis upon which the agency selects a contractor. The RFP defines the nature and content of the proposals received and in turn define the contents of the contract. If important issues are overlooked in drafting the RFP, it may be difficult to insert them later. Accordingly, some jurisdictions literally import the contents of the RFP into the contract as the primary statement of work.

The agency needs to know what it wants, but if it rushes, or is rushed by political pressure, expectations may easily be overlooked. Precision in the RFP avoids misunderstandings and provides the basis for an equally precise contract. As one Department of Corrections survey respondent noted, “Don’t hurry with the RFP. Analyze fully the DOC’s expectations. Be very exact and firm. Expect the best.”

RFPs: A Homemade Product

Despite an increasing number of agencies contracting for prison beds, most corrections agencies responding to the survey reported that they developed their own RFPs with relatively little reliance on or examination of the work of other agencies. Those most experienced with the solicitation and contracting process say that this is a mistake. One department official answering the survey described his agency’s first RFP as “a bit primitive by today’s standards. We did not seek help from an outside consultant [although] in retrospect, we should have.” The “do it yourself” approach to RFP development, where the RFP is developed from scratch and relies exclusively on in-house resources, seems shortsighted today. An agency can benefit from the experiences of others.⁴ Similarly, a consultant with extensive experience serving multiple agencies in the preparation of private prison RFPs and contracts can offer valuable insights into the process.

The suggestion that agencies look at what others have done should not be construed as a recommendation that an agency simply cut and pastes its RFP or contract from the work of others. In every case, individual, agency-specific work is necessary because of factors such as differing policy approaches to facility operation, varying levels of expertise and experience in contracting, and the unique requirements of state law.

⁴ ASCA maintains a collection of RFPs and contracts from various DOCs.

Who Prepares the RFP?

When asked who was the most important group to participate in developing the RFP, most respondents to the questionnaire noted: “prison operations staff.” By this they meant the input and involvement of not just wardens and other prison managers, but also that of seasoned staff expert experienced in the aspects of prison operation relevant to the contract, including security, medical services, plant operations, food service, and the like.

According to questionnaire respondents, assistance from agency legal counsel in preparation of the RFP was second in importance. Counsel can play at least two roles in the RFP and contracting processes. One is to assure the basic legal requirements of state law are met in each process. Counsel can also provide valuable assistance in the contract drafting process, where careful wording of contract’s clauses is of great importance. Avoiding technical errors in the RFP and contracting processes reduces grounds for potential challenges to the final result.

Consultants were cited as the third most important contributors to the RFP drafting process. Especially for agencies entering into a prison bed contract for the first time, an experienced consultant can help the agency avoid mistakes others have made and assure high quality RFPs and contracts. Interestingly, some agencies answering the survey spoke strongly in favor of using consultants, while others indicated they themselves did not use consultants in either the RFP or contracting process.

In any jurisdiction, there are important stakeholders to be identified and involved in any major contracting process. In the state government context, stakeholders external to the corrections agency may include representatives of the Attorney General’s Office/ In other jurisdictions, involvement of the state procurement agency is critical. While the cast of important stakeholders may vary from one jurisdiction to another, the lesson holds for all: if significant stakeholders in the state contracting process are not included throughout the processes of developing the RFP and contract drafting, inter-agency squabbles may arise late in the process that could threaten to undermine the weight and force of the contract. Such inter-agency issues may prove to be important concerns in their own right, or may be turf issues, but the result will be the same: if at the last minute a significant and powerful stakeholder says “you can’t do this,” the agency risks losing significant amounts of both time and money.

Agency managers might not immediately think of involving potential bidders in the RFP development process, yet this is exactly what one large jurisdiction has done, and finds it yields valuable benefits. The agency accomplishes this by publishing a draft of the RFP in a legal newspaper, such as the *Commerce Business Daily*, and inviting comment. It also conducts open meetings with potential vendors to discuss the content of RFPs in a more general fashion. These “interchange meetings” are announced in advance to all known potential vendors and have been the source of valuable input. Such a process

must be carefully structured so as to avoid creating questions about the fairness or appearance of fairness. One of the private agencies also urged that the RFP process include input from private providers, suggesting that such input could avoid placing unrealistic expectations on the providers or including requirements that may increase the cost of the contract without commensurate improvements in the final product.

* * *

V. Contents of the RFP

In this section, elements of the RFP that have been identified by public and private corrections commentators who responded to the questionnaires as important to consider or include are presented and discussed. Please note that this should not be construed as a catalogue of all of the issues that should appear in a Request for Proposal, but rather those that expert commentators and respondents to the questionnaires have identified as important aspects to bear in mind when crafting an RFP.

Clarity and Specificity

First and foremost, the RFP must be clear with regard to what the government is seeking and provide sufficient specificity so potential bidders can respond appropriately and sensibly. One private contractor offered an example where an RFP required a bidder to submit a bid lower than it cost the state to run a comparable facility. However, the RFP failed to identify the state's operational costs at that facility, or whether the target cost included construction. The same company offered another example of why specificity is important, arguing that asking for a "500-bed medium custody facility meeting ACA physical plant standards" could conceivably result in a "wood frame building with a single 10 foot fence around it."

Rigidity or Flexibility

The commentators described two distinct models for developing and presenting the RFP and subsequent contract. The first might be called the "DOC mirror" approach, while the second is a "what do you think" approach. Under the mirror model, the RFP is very detailed, and asks that the contractor adopt and follow DOC policies and procedures to the letter. It is a requirements-based approach. Under the "what do you think" approach, the RFP indicates what the agency's expectations are, but leave the potential contractor more latitude to determine how it would go about meeting those expectations. This is the performance-based approach. Even under the latter approach, there are likely to be at least some policies that the agency will demand the contractor to follow. But in the main, in order to stimulate creative approaches and economies, the contractor will be allowed considerable latitude in proposing how the bidder will achieve certain objectives set by the agency.

The advantage of the mirror process is that it tends to produce a prison that replicates other institutions in the agency. Its disadvantage is that it tends to stifle any flexibility and innovation that the contractor might bring to the operation of a prison, benefits the private prison operator might arguably offer. One observer suggested that the mirror approach might increase the Department's liability exposure in that if the contractor were sued over following a particular policy or procedure, it could defend by say-

ing “the Department mandated the policy.”

In some situations, it is important that a contractor adopt and follow DOC policies and procedures and operational methods, especially those relating to classification, compatible computer systems, discipline, inmate records, and the like. In other situations, the need for consistency is less compelling. In considering the extent to which agency managers will demand compliance with its own policies and procedures, or allow bidders to propose their own ways of addressing operations, they may want to ask themselves whether the agency’s regulations, policies, and procedures might stand improvement. Why not give the private provider the opportunity to present a different approach, one that is perhaps better than the agency’s? Consistent with this thought, at least one agency involved in the contracting process includes its contractors in its annual review of policies.

An agency should provide some flexibility to bidders in the RFP process. By asking bidders to explain “how do you propose to do ‘X’ or meet ‘Y’ goal,” the bidders are given the opportunity to demonstrate the quality of their management approach, at least on paper. If the agency is not satisfied with the response from a bidder, it can look to others or negotiate over areas of disagreement. Also, a very rigid RFP may serve to hamper the agency’s ability to negotiate the terms of the final contract.

The form of the RFP also can dictate the form of the response. The author of this monograph recalls a situation where an unsuccessful bidder for a contract submitted a response to an RFP, which said, in essence, “we will do precisely what the detailed RFP demands.” While technically responsive to the RFP, this form of proposal was very hard to evaluate. Alternatively, the RFP that challenges the respondent to explain HOW it will meet the expectations of the agency should give the agency a good deal of information about the respondent and help the agency in selecting the best provider.

Reasonable Expectations

One private vendor responding to the survey made the point that it was unreasonable for the RFP to ask private vendors to do that which the government does not demand of itself.

“There are RFPs that come out that won’t guarantee an occupancy, yet wants the provider to guarantee 100% staffing no matter what the occupancy. This is not realistic and is not economically viable to operate a facility at 40% occupancy with 100% staffing. The price will contain an inflated risk factor premium. Keep the playing field level.”

There are other examples of agencies setting expectations to which they do not hold themselves. One is imposing monetary penalties for a vendor’s failure to comply with performance standards that either may not be imposed for the agency’s own prisons or, if they are, may not be strictly enforced. Even when the agency makes every effort to assure that its prisons follow agency policies and procedures, what public agency removes money from the budget of an individual prison as a consequence of not fol-

lowing a policy or achieving a goal?

Requiring more of a private agency or imposing consequences for not meeting contract requirements that are not expected of public institutions is not necessarily unreasonable. Contracting may provide the government a way to raise the quality of prison services than it itself provides. However, when the government demands more of its vendors than itself, the degree of the disparity should be considered.

Challenge-proof

The head of one agency with contracting experience strongly advocates making the RFP process “challenge-proof.” Factors that may make an RFP less prone to challenge include:

- Set a process and stay with it. (Most state procurement agencies have well-established guidelines for contractor selection processes.)
- Control contact and input from potential contractors. (But note, as others experienced in the contracting process point out, this does not mean eliminating input from potential bidders. The key is control.)
- Avoid favoritism, or even the appearance of favoritism.
- Develop and apply guidelines for evaluation of the bids.
- Avoid crafting an RFP that favors one company, either intentionally or unintentionally.

Adhering to the “challenge-proof” standard may create a dilemma with regard to setting a high RFP evaluative value on contractor experience in that it may, without meaning to, disproportionately favor the very experienced company. One observer suggests focusing more on the experience of the people designated by the bidder to be involved with the contract, rather than just the experience of the company. There is, however, no guarantee that the people identified in the proposal, such as a designated warden, will ultimately take on that role. Evaluating the company’s track record, independent of designated personnel, remains of major importance.

Procurement Code Technicalities

Government procurement codes may include very specific, highly technical requirements for the bidding process. Failure to comply with these requirements may automatically disqualify a bidder. For example, a bid may be discarded without further consideration if the bidder inadvertently forgets to sign its proposal. The RFP should note these requirements and clearly indicate whether non-compliance with any of them will result in the disqualification of a proposal.

Costs

As a general principle, the RFP should include everything that will affect the costs of the contract and everything that the agency believes it will need to properly evaluate the contract.

One example of a cost related item that should be included in the RFP is an explanation of how the agency proposes to address payments during a new facility's startup period. It may be the agency's intention that new inmates be added over a period of time. If so, the contractor should not be expected to fully staff the facility while it houses less than a full complement of inmates. Basing payment during the ramp-up period on a per diem that in turn is computed on the basis of costs when the facility is at or near capacity will mean that the contractor will not be fairly compensated for costs incurred during the ramp up period. If potential bidders know this when preparing their bids, they can adjust their per diem bids accordingly. If they do not know how payments during the ramp-up period will be handled, they may substantially underbid and be effectively penalized.

Another important cost element that needs to be considered and set forth in the RFP is the agency's expectations and requirements for inmate programming. Contracts commonly call for specific programs to be provided and/or set percentages of the inmate population to be involved in programming. These requirements carry a price tag, and should be spelled out clearly in the RFP.

Medical care is yet another important cost element. The agency should consider the extent to which it will expect the contractor to absorb all medical expenses, or whether the agency is prepared to step in at some point to take over the care of inmates with serious chronic injuries or illnesses or special needs. For instance, it is common practice for the contract to provide that after an inmate spends a set number of days in an off-site hospital, or when the cost of off site care reaches a certain amount, the Department is notified and then has the option of taking over direct responsibility for the continue medical care of the inmate.

Price: A Factor, But Not The ONLY Factor

There is a uniform belief that the RFP evaluation process should be structured to avoid price driving the selection process. While price is obviously an important factor, it should not be the sole determining factor, lest an agency find itself compelled to accept what could be a low-ball bid from a would-be contractor who will either provide low quality services and/or almost immediately begin wheedling for increases in the contract price. One private company suggested the selection decision should be based on "on the 'best value' to the government, rather than the 'lowest cost.'"

Subcontracting

Contracting for various aspects of a prison's operation, such as medical care or food service, was

common before total prison operation contracts arrived on the correctional scene, and remains common practice. It might make sense for the private provider to do the same. Accordingly, the RFP for a total prison operations contract should address the extent to which the successful vendor will be permitted to subcontract for services and offset forth the approval process and oversight power the Department wishes to retain over the subcontracting process and subcontracted operations.

Monitoring subcontracted operations can be cumbersome if the monitor's concerns must first be directed to the prime contractor, who in turn passes them on to the subcontractor for response and corrective action. The agency should consider whether it would impose liquidated damages on the prime contractor for errors made by the subcontractor.

Despite such concerns, subcontracting can improve the final contract performance if, for instance, a food service sub-contractor is better able to provide high quality food service than a "generalist" prison operations company. However, it may also increase monitoring and contract enforcement problems, as the agency may have to work through the general contractor to address compliance concerns stemming from actions of the subcontractor.

Fiscal Strength of Company

The fiscal strength of a company can be important to the success or failure of a contract. In the worst-case scenario, a company could go bankrupt. In other situations, fiscal problems could prejudice its ability to deliver expected services. Therefore, the RFP should request that bidders provide information that will allow the contracting agency to assess their fiscal stability. As an example of the detail that might be considered, one state expected the successful Offeror to provide the following information for final evaluation (obviously, each Offeror could have been required to provide such information):

1. Audited financial statements for the Offeror, and each of its predecessor and affiliated entities for the previous five years, or for each of its years of operation, if fewer than five years.
2. Organizational structure of the Offeror, including its legal structure and level of ownership of each shareholder or partner in excess of five percentage points.
3. Analysis of financial performance of the Offeror on similar projects, including prices on other contracts awarded to the Offeror and subsequent year contract prices for said contracts.
4. Bank balances and lines of credit (outstanding and available balances).
5. Financial covenants and maturities of long-term liabilities.
6. Description of any prior or current bankruptcy proceedings involving the Offeror, its predecessors, its affiliates or its principals.

7. Description of any prior or current security investigations involving the Offeror, its predecessors, its affiliates or its principals.
8. The plan of financing the Offeror intends to employ for this project.

Unique Inmate Needs

An agency may house inmates with unique needs, such as those with unique religious practices (Native Americans, for instance). Potential bidders may not be aware of these groups or their needs. Other special needs issues can arise if inmates with language barriers are likely to be transferred to the facility, creating a need for interpreters. Similarly, sign language interpreters will be needed if inmates with serious hearing disabilities are sent. The RFP should at the very least alert potential bidders to these populations. It might go further and request that bidders address how they would go about addressing the needs of identified groups with special needs.

A related special need problem may arise if an agency contemplates housing inmates in facilities in other parts of the country, especially if it plans to house inmates from multiple jurisdictions in one facility. Such a facility may have less flexibility to meet such needs.

Staffing

Having adequate numbers of properly qualified, trained, and experienced staff is crucial to a smoothly running prison operation. Staff also is a major cost component of prison operations. How bidders address staffing can be a major point of evaluation of RFP responses. Where an agency is considering contracting for beds in a currently operating prison, it may face a “take it or leave it” situation regarding accepting staff identified by the successful bidder. Even in such situations, the RFP could require complete information about staffing as an evaluative tool. Where an agency is contracting for an entire prison, it will want to maintain control over staffing levels. One corrections department suggested being especially vigilant about the kind and level of middle management and support staff. The importance of strong, competent mid-level staff cannot be overstated. Good supervision will assure that policies and procedures are carried out and can overcome the effects of weak training. By contrast, weak supervision will almost assuredly lead to policies not being followed and the gradual deterioration of the facility operation.

Reporting

The RFP should indicate what kind and at what frequency various types of reports must be submitted to the agency. The RFP may also set content expectations as well. For instance, requiring that log reports from segregation units be submitted may not provide the information the agency wants, unless the agency also can control what information is recorded in those logs.

Monitoring

The form of the monitoring process should be described in the RFP, and then incorporated into the contract. This would include, but not necessarily be limited to, such items as the monitors' access to the facility, staff, inmates and records; office space for monitors and support staff, and so forth.

Contractor Quality Control

While the government will necessarily establish and maintain its own contract-monitoring program for quality assurance purposes, it should give consideration to requiring the contractor to establish its own quality control program. Such a program is not intended as a substitute for the government's own monitoring, but it can complement that program, as well as serving the overall goal of helping to assure that the prison operates according to expectations. Asking bidders to explain how they would monitor their own performance under the contract can also provide a useful factor for evaluating proposals.

The Inmate Welfare Fund

While ultimately the inmate welfare fund is designed to be self-supporting, it may require seed money at the outset of the contract to allow it to function. If the agency is to provide the seed money, it may require that it be paid back through proceeds from the fund. In any event, the RFP needs to address this issue.

Lease on Property

Where the private contractor both owns and operates the prison, the question arises as to what the agency would do for beds should it decide to terminate the contract. One option is for the agency to enter into a separate lease agreement with the contractor for the prison. This lease agreement would survive termination of the contract and give the agency the option of operating the facility itself or bringing in another contractor to operate it. While top management of the terminated private provider would leave when the contract was terminated, most of the staff would remain, and would be available to begin work for a new contractor.

Requirements of State Law

While the RFP and contract are very likely to require the contractor to follow state law in most instances, there can be a question about whether a particular statute applies to prisons operated by the Department of Corrections, or whether it protects inmates under the jurisdiction of the Department. In the former instance, the government may not have to insist that the contractor follow the statute, while in the latter case, the contractor would have to meet the demands of the statute.

Court Orders

Many agencies operate facilities under one or more court orders. These orders sometimes apply system wide. The agency should determine whether existing orders would apply to a new contract facility. If the orders do apply, prospective bidders will need to see copies of those orders and may legitimately want to know about the general progress of the litigation.

Submission of Proposal on Diskette

A simple suggestion from one private contractor was that proposals be submitted on diskette, as well as in hard copy. This can facilitate the mechanics of assembling the final contract.

* * *

VI. The RFP Process

The primary goal of the RFP process is to elicit well-drawn proposals from qualified bidders that respond to the RFP in a form that facilitates evaluation of bidders. The content of the RFP, the information it asks bidders to submit and the form in which that information is submitted, help determine whether the goal will be met. The RFP process also can help or hinder the attainment of that goal.

Complexity

An excessively complex RFP may stifle responses to it. Several Departments of Corrections responding to the questionnaire offered the view that their RFP process had become too complex and they were working to simplify it. Others indicated that their RFPs had changed over the years as they had learned more about the process. This suggests that there is a learning curve to the RFP /contracting process. Agencies taking advantage of the knowledge of the experience of others will find the learning curve not as arduous.

Substance, Not Form

Representatives from public and private agencies alike commented about setting up the RFP process so as to elicit substantive responses and discourage lengthy, elaborate proposals that put a premium on form over substance. As an indication of the bulk of material that an RFP may generate, nine responses to a design-build-operate proposal in one state filled more than 80 file boxes and produced more than 80 rolls of drawings. The RFP process, which may include both written and oral presentations, as well as an in-depth examination of bidders' actual performance, is intended to demonstrate the qualifications of the bidders and how well they are prepared to deliver the services sought in the RFP. It is not a contest to see who can produce either the longest or the glossiest product. Some agencies specifically discourage lengthy or "elaborate" proposals to try to avoid being overwhelmed with material.

Timing

Both public and private survey respondents identified concerns about time available to the agency to develop a quality RFP and bidding process, as well as that provided to bidders to develop a bid and response. One representative of a large agency emphasized the importance of an agency taking its time in the drafting process, and constantly reviewing its work.

A private company noted that while the public agency may take six to twelve months to draft the RFP, it may not allow potential bidders enough time to develop a good response. This company suggested 90 to 120 days was a minimum allotment of time for bidders to respond. Another suggested 12 weeks to respond to a facility operations' RFP.

In contrast to these suggestions from bidders, one state set a time line of one month from the date the RFP was mailed out until proposals were due. This schedule was set in a re-bid process, so the state may have assumed that bidders already had submitted bids and would be fine-tuning them in the re-bid process. In another RFP for a design/construct/operate contract, one that did not involve a re-bid, the RFP was mailed on March 5 with proposals due on April 30, giving bidders less than 60 days to respond.

Public agencies familiar with the contracting process may worry that extending the response time for the RFP will to some degree defeat one priority of the contracting process, which is to bring beds on line more quickly. One large prison system requires responses to its RFPs in 60 days, but permits potential bidders to request extensions. Extensions, if given, are granted to all respondents. The agency informally reports that extensions are granted in perhaps half of its RFPs.

While the public agency may feel various pressures to speed the process along, cutting time corners both in the RFP development and the response times is likely to prejudice the ultimate outcome of the contracting process.

Related to the time allowed for the development of proposals was a comment from a private provider that the question and answer period in the RFP process should be at least three weeks long and should contain a requirement for rapid (48 hour) responses from the agency.

* * *

VII. The Evaluation Process

A carefully designed and comprehensive evaluation process is important not only in selecting the best contractor, but also in assuring the selection process will withstand legal challenge.

Who Participates

Most jurisdictions use a team to evaluate proposals. In at least one agency, multiple teams were used in the selection process with team members representing a cross section of expertise. Most proposal evaluators come from the Department, but it is common to see evaluators drawn from other state agencies with expertise relevant to various aspects of the evaluation process. Consultants sometimes participate in the evaluation process. If the contract monitor has been identified prior to the selection process, including that person in the evaluation process is a common practice, and is recommended.

The Process

According to the survey respondents and expert commentators, agencies should consider developing the evaluation process at the same time it develops the RFP. Understanding how the agency wishes to evaluate proposals, and especially what portions of proposals are of greatest importance, may help the agency structure the RFP itself.

The process commonly begins with a quick screening of proposals to determine that they are in fact responsive to the RFP. In some jurisdictions, the process begins even sooner by requiring potential bidders to pass through a Request for Qualifications process that can serve to eliminate unqualified companies.

Evaluation of the proposals for all aspects other than pricing typically comes next. This task is commonly assigned to a multi-disciplinary team whose members come from both inside and outside the Department. It may include consultant assistance. The task may be structured somewhat by the use of evaluation checklists.

One state reported that it used a multi-disciplinary team to evaluate the proposals, but left the actual scoring of the proposals to another team. In this way, the second team could not only examine the proposals, but also review the findings of the first team and question its members.

The combined results of the technical proposal, basic bidder qualifications, the cost proposal, and all other evaluated aspects of the RFP typically provide the basic information needed to rank the bidders. It is common for the agency to reserve the right to either select what it believes to be the top bidder at this point, or to enter into negotiations with more than one of the top bidders. Under either approach, negotiations are common, culminating in the agency asking one or more bidders for a best and final offer. By allowing for discussions with the top bidder(s) and a best and final offer, instead of simply selecting

the highest ranked proposal, the agency increases its ability to obtain the best possible contract.

Evaluation Criteria

Selecting the best contractor from several bidders is an inexact science. The ability to draft an attractive, convincing proposal is no guarantee that a company can run a prison well. To increase the probability of selecting what is truly the best candidate from competing bidders, agencies need to carefully identify the criteria against which proposals will be measured. Furthermore, the agency needs to decide how it will weight those criteria.

The Technical Proposal

The technical proposal, the portion of the proposal that describes how the bidder will actually operate the institution, is the primary area of evaluation.

Cost

Cost is an important criterion, but both public and private sources agree that it should not be the sole determinant.

Quality Control

The Bureau of Prisons has found that requiring bidders to propose a quality control program by which they would evaluate their own performance provides a useful point for evaluation. But as noted earlier, a quality control program operated by the contract agency should never be intended to replace the agency's own comprehensive monitoring efforts.

Experience and qualifications of the proposer

The experience of a bidder is an important factor for evaluation. Evaluation of experience is perhaps best accomplished through careful reference checks with other agencies that have contracted with the proposer.

Factors that might be considered in evaluating a company's experience and qualifications include:

- The history of the organization;
- Its recent experience in operating facilities similar to the one anticipated by the current RFP;
- The financial strength of the company;
- Reference checks made with potentially all of the government agencies with which the company has contracted;
- Evaluation of circumstances around any contracts which the company has had terminated;

- The background of the people the company proposes to assign directly to the project in question; and
- The company's history of litigation.

There is, to some extent, a dilemma created by heavy reliance on experience in that the more experience counts in evaluation of a proposal, the more difficult it will become for new companies to enter the field. If competition for contracts evolves down to only two or three major companies, the benefits which competition in the marketplace is supposed to bring may be lost.

Weighting Evaluation Criteria

In addition to identifying the criteria with which a proposal will be evaluated, the agency must also decide how the various factors it defines will be weighted. Two examples, each demonstrating a somewhat different approach- to the weighting question, are noteworthy. One state assigned weights to its evaluation criteria from 1-10 and then scored each factor from zero to nine, with zero being "does not meet the criteria" and nine being "greatly exceeds." The criteria score was then multiplied by the weight factor. Another state took a somewhat different, more general, approach. It identified seven broad areas of concern, and assigned a point value to each. Each large category was further broken into smaller sub-categories. Points available in each of the seven categories ranged from 50 to 175, and totaled 900. In the largest point category, "correctional services quality," there were 10 subcategories:

ACA accreditation	26.25 points
Staffing plan	26.25 points
Staff experience	7.00 points
Staff training program	26.25 points
Security staff numbers	26.25 points
Food service plan	7.00 points
Maintenance plan	8.75 points
Academic Program Participation	7.00 points
Inmate work program	7.00 points
Quality of plan	26.25 points
Total	175.00 points

More details of these two approaches appear in Appendix A.

Another state followed a still more general approach, at least insofar as the specificity of its RFP was concerned. It listed four evaluation criteria in order of descending importance, but did not indicate the relative importance of the criteria. The criteria were (1) cost, (2) operational plan (which listed rehabilitative programs, security, administration, and quality control as sub-factors), (3) general (which included past performance, experience, financial strength, and insurability) and (4) historically underutilized business.

One jurisdiction broke down its design-build-operate RFP into mandatory and discretionary sections. An offeror was not required to respond to any of the discretionary sections. However, as a practical matter, response to these sections was essential as each section was assigned a specific number of points for evaluation purposes. Not responding to any of the sections would have left a potential bidder at a distinct disadvantage. Scoring on the discretionary sections was evaluated equally with scoring on the cost proposal (which was evaluated solely on the basis of lowest cost to the state). Each discretionary section (and sometimes subsections) indicated how many points could be earned or deducted for that section/subsection. Thus, for instance, experience in contracting for design, construction, and/or operation of an adult correctional facility was worth up to 180 points. However, description of major disturbances in other facilities operated by the offeror could result in a *deduction* of up to 90 points. This approach gives potential bidders clear guidance on how the agency weights and will score various portions of the Proposal.

In discussions of drafts of this document, one participant experienced in the contractor selection process added a note of caution about the evaluation process, calling attention to the fact that in a challenge of a bid award made by losing bidders, the evaluation process will be a common target for review. Notes taken by evaluators may be subject to examination and analysis. A very finely tuned set of evaluation criteria may provide more bases for challenge than a more general set of criteria. His remarks accent the earlier admonitions comments in these pages about the value of “challenge proofing” the entire process using the advice of counsel.

Confidentiality

Maintaining confidentiality throughout the evaluation process may be important in avoiding complaints regarding the fairness or appearance of unfairness in the process. Portions of the proposals may also contain proprietary information that the bidder will want treated confidentially. The extent to which this is possible may depend on state law.

Protests

Actually drafting and signing the final contract may be delayed by protests to the tentative bid award. The jurisdiction’s law will probably define the steps, which typically can end with a judicial review of the process. The protest may postpone the agency’s ability to enter into the contract, further underscoring the importance of following an RFP and bidder selection process which leaves little room for protest and, when protests do arise, makes responding to them as quick and simple as possible.

Conclusion

Selecting the successful bidder brings the RFP stage of the process to a close and marks the beginning of negotiating and drafting the actual contract.

Selecting a successful bidder does not necessarily mean the agency forever leaves behind unsuccessful bidders. A number of circumstances could result in the agency again discussing doing business with unsuccessful bidders, including the possibility of contracting for additional beds in the future. For this reason, agencies experienced in contracting caution against burning bridges between the agency and losing bidders, as these same companies may be potential future contractors. Some suggest ending the RFP process with debriefing sessions with unsuccessful bidders. Keeping files on unsuccessful vendors is also recommended.

* * *

VIII. Drafting the contract

The task of drafting and negotiating a contract for the operation of a large prison, a document running perhaps for scores of pages, would seem a daunting task. Yet most of the survey respondents who answered the question regarding the complexities involved in negotiating a contract and setting the result in written form indicated this was a relatively simpler task than what preceded it. The reason: the hard drafting work had already been done in the RFP, which only goes to emphasize the importance of that original task.

One agency developed a *pro forma* contract that was incorporated into the RFP. This contract was the product of drafts, review, and input from people throughout the department. Input from private companies could be included in this process. This approach, or similar approaches that begin with a comprehensive RFP, reduce the contract negotiation process to little more than the contractor signing a document, which says “I will do what the RFP requires.”

Agencies put different levels of intensity into the development of the contract. Contracts reviewed for this paper ranged in length from 29 pages to hundreds of pages. The potential complexity of the contract is shown by the index of contract sections taken from contracts from Alaska and Michigan, which appear as Appendix B to this paper. The agency favoring a short contract must remember that the contract will define the duties and obligations of the contractor: if a topic is not addressed in the contract, the contractor has no obligation in that area. If a topic is addressed in a general fashion, the agency may be unable to require the contractor to perform in that area as it wishes. Clauses written around terms such as “reasonable” or “adequate” are subject to differing interpretations and dispute.

Integration of Operations

A private prison is, in a sense, part of the Department of Corrections, yet its operators can be excluded from much of what the Department and its publicly operated facilities do. On the other hand, its operations can largely be integrated into the larger agency. Integration is to some extent a virtual necessity. The private facility will undoubtedly be expected to use the Department’s classification system, and to follow various other Department Policies and Procedures. It will be required to use at least some DOC forms. But what about shared training, joint participation at conferences, and the sharing of intelligence information, among other things? One private contractor spoke in favor of maximizing integration.

While the Department’s contract monitoring system should remain at arm’s length from the contractor, the private providers identified integration in other areas as an important development. Officials from public agencies generally agree.

IX. Contract Content

This section presents topic areas, language and provisions that appear in most contracts between departments of correction and private prison companies where the department is providing all of the inmates for the private prison. In situations where the private facility is providing housing for multiple jurisdictions, its operators may unwilling or unable to agree with many of the clauses that follow, e.g., a requirement that the private facility comply with all policies and procedures of the sending jurisdiction.

A. General Administration

Accreditation

Accreditation under appropriate American Correctional Association (ACA) Standards is routinely required. Separate accreditation of the medical system under standards adopted by the National Commission on Correctional Health Care (NCCHC) is also very common. The main variance between contracts is how long the contractor has to obtain accreditation. The contract should specify the time frame for the private provider to attain accreditation.

Some contracts require the contractor in various ways to keep the agency apprised of its progress towards attaining accreditation. This precaution would alert the agency early on to accreditation problems and give it a better opportunity to deal with them.

Note that a requirement that the provider become accredited (through ACA or other accrediting processes focused on specific aspects of operation such as medical care, vocational programs, etc.) is not the same as a contract requirement, which demands compliance with all accreditation standards. If the agency wants to hold the contractor accountable for compliance with all standards, a clause separate from the general accreditation requirement should be included in the agreement.

Some standards demand that there be policies and procedures in certain areas, but do not specify the content of those policies, except in relatively general ways. Where accreditation is required of the entire facility and/or various component parts, such as the health care system, the agency should review the accreditation standards to determine whether it wishes to demand more of the contractor than relatively general standards require.

Administrator Qualification and Selection

The Department has a legitimate concern over the quality of the top administrator(s) in the private facility. This concern could be addressed through such means as:

- Setting mandatory minimum qualifications for the warden, and perhaps other key

officials. One agency extends this requirement to the level of shift supervisor. Another way to address this for all staff is to require that all staff meet the minimum qualifications for DOC staff.

- Allowing the Department approval or veto power over certain officials. However, this power might increase the agency's liability exposure, either toward rejected candidates or when the official approved by the agency proves inadequate.

Office Space

Various Department staff may work at the private facility. The most common example is the contract monitor, including, possibly, the support staff for the monitor. The contract should recognize what staff will be stationed at the facility and require that suitable office space be provided for them as well as addressing provisions for supplies, utilities, etc.

Right of Entry

The contract should require that the monitor and other designated state officials have the right to enter and inspect every part of the facility at any time, as well as addressing their right of access to all inmates, documents and records maintained by the facility.

Certain DOC officials obviously need a right of entry, but the department may want to provide for a right of entry for other officials, such as legislators, or auditors from other government agencies. Consider including a qualifier that the officials should be on "official business."

Computer Systems

A Department of Corrections may have a variety of its functions computerized, including inmate management information systems, general accounting, commissary, inmate welfare funds, etc. The agency should decide the extent to which it will want the contractor to tie into these systems.

Where the contractor maintains separate computerized information, the agency should consider the extent to which that data should at least be in a form that is compatible with the agency's computer systems. Assuming the provider will have access generally to DOC systems, consider whether the contract should specify who on the provider's staff would be able to access the computer system with the power to add or remove information.

Term of Contract

The contract will specify its duration, a factor that may be determined, or at least affected, by state law. Even where a presumptive duration of three to five years is included, contracts also typically include a clause stating that the duration of the contract is dependent on the agency receiving appropriate

legislative appropriations. Another clause can address the question of extending the contract for additional years beyond its initial term.

B. Operational requirements

State Policy and Procedure Manual

The extent to which the Department mandates that the contractor adopt the Department's regulations, policies and procedures represents a major philosophical divide in private prison contracts. Some states mandate that the contractor comply with all State policies and procedures and that any changes in policy or procedure which the contractor wishes to adopt are subject to DOC review and approval. As noted earlier, this approach directs that the facility mirror other DOC institutions. The consistency this approach produces may come at the expense of possible flexibility and innovation that the private provider may be otherwise able to offer.

The agency considering mandating the contractor follow "all Department of Corrections Policies and Procedures" should exercise care in determining if it really means each and every departmental policies and procedures. Some policies may be driven by aspects of state law and/or uniquely related to government operations and need not be applied to a private provider, such as the requirements of the state's civil service system or procurement of goods and services. A better approach would be for the agency to examine its policy manual and determine, policy by policy, which ones it wants the provider to follow and what areas it is willing to allow the contractor more flexibility to develop its own policies.

Less restrictive approaches might require adoption of departmental rules in some key areas where uniformity among the institutions under the Department's jurisdiction is important, but leave other areas to the discretion of the contractor, subject to DOC review and approval. This approach provides more flexibility for the contractor and may give the Department a site for testing and evaluating alternative policies and procedures. Topics where uniform policies would be important include such areas as classification, discipline, and the like. The Department's review of the provider's policies should also consider whether any of them actually conflict with the department's policies and whether such a conflict is acceptable. Regardless of whether the contract mandates the contractor adopt Department policies or is free to develop its own (subject to Department approval), the contract should require, as an enforceable condition, that policies and procedures be followed.

At the very least, the agency should retain the power to review and approve the policies and procedures of the private provider. This approach allows the agency to selectively require that the contractor follow agency policies, but still leaves room for the provider to demonstrate its own way of dealing with a particular area is appropriate and satisfactory. One contract reviewed required only that

the Policies and Procedures “comply with ACA” requirements. But this may mean little, since ACA Standards typically require policies and procedures, but dictate the content in only the most general fashion.

In contractual situations where the contractor is housing inmates from multiple sources, the agency may not be able to insist on its own procedures being followed. Where the agency faces this situation, it should examine the provider’s policies and procedures closely during the selection process to determine if those policies and procedures are acceptable. If they are not, and the proposed contractor cannot change them in a manner acceptable to the agency, the agency probably should look elsewhere for beds. In such contracts, the agency should also insist on the power to review any new or changed policies, and have the ability to terminate the contract if such changes are not acceptable.

Inmate Records Management

Where the contract is for the exclusive housing of inmates from one jurisdiction, it is common that the private facility is linked into the Department’s main inmate management computer system and is required to keep inmate records with the same format and content as other prisons in the department. The agency will need to provide training and updating for the contractor’s employees in use of the computer system. The contract should include a clause imposing the same confidentiality rules for the handling of inmate records as exist for the agency generally. Where other records are computerized, such as inmate banking, commissary, and inmate welfare fund, these are also tied into the DOC’s main computer system, or at least compatible with it.

Public Records Disclosure

The agency should determine to what extent records maintained by the contractor are considered “public records” under the state’s freedom of information/public records disclosure laws, and then determine how it expects the private provider to handle public records disclosure requests. For instance, will the provider be allowed to disclose records directly to a requestor, or will it refer all requests to the Department? The disclosure of some records may not be automatic but may require a discretionary decision by an official. Who will make such decisions?

Media Relations

Closely related to public records issues is the topic of media relations, since many public records requests will come from the media. Note also that the entire concept of contracting for prison beds is one that the media is often concerned about. The agency should consider how it expects the provider to deal with media contacts, and the extent it wants to be advised of those contacts and the nature of information provided.

Assignment of Inmates

Any private prison is intended to be one part of the larger whole of the Department of Corrections. For this reason, the contract should make it clear that placement and removal of inmates is a matter left to the discretion of the Department. A clause may address the process by which the private provider could object to the placement of a particular inmate or and could request transfer of an inmate. The agency's normal classification process may address both of these.

One contract provided that the agency would send paperwork on proposed inmates prior to the actual transfer and the contractor could, within a relatively tight time frame, reject an inmate. Rejections were subject to a DOC override.

Transportation

Inmates will have to be transported to and from the private facility. Some transfers may be routine, while others may arise in emergency situations. Inmates will also be moved back and forth between the facility and local medical facilities. These movements, and the security they require will have a cost impact. The contract should address who has the responsibility for moving inmates in given situations and who must absorb the cost of such movement.

If the agency is considering requiring the contractor to be responsible for transporting inmates to and from departmental facilities and its own prison, the agency should examine how that transportation would be handled, especially if overnight housing is involved. Such housing is traditionally obtained from local jails. However, the author of this monograph has spoken to at least one jail administrator who refuses to house inmates being moved by a private inmate transportation service because of concerns over the manner in which the service handles inmates. Congress recently spoke on the interstate movement of some inmates, with the passage of the Interstate Transportation of Dangerous Criminal Act of 2000, or "Jeanna's Act," P.L. 106-560. This statute mandates the U.S. Attorney General adopt regulations relating to the transportation of "violent prisoners in or affecting interstate commerce." The areas of regulation pertain to such things as security precautions and qualifications and training of persons involved in the transportation. The statute was passed in the last days of 2000 and requires promulgation of regulations within 180 days.

Occupancy / Start up

Both the contractor and the agency may have reasons for wanting to fill the facility to its maximum rated capacity as quickly as possible. However, in a start-up situation, putting too many "experienced" inmates too rapidly into a new prison may overwhelm a new, largely inexperienced staff and create serious operational problems.⁵ The agency should be conservative in how rapidly it transfers

inmates to the new facility. A very gradual assignment process may affect payment schedules during the early portions of the contract.

Contracts provide for startup placements at rates such as 11 inmates per week, reaching a total of 500 in 60 days; 200 per week unless the Department feels security is being compromised; 475 inmates 90 days after transfer of first inmate.

Of obvious relevance to the start-up transfer rate will be the experience of the staff in the private facility. While the contract can address this to some extent, a new facility will be likely to have substantial numbers of staff with little or no experience.

There may be other aspects of the start-up process that are of concern to the Department. If the Department identifies such concerns, it can demand that the contractor address them.

The start-up period, from the date facility managers begin to bring on staff to the date that the facility reaches its general operating capacity, is a time period with major cost implications. The facility presumably will be fully staffed even before inmates begin arriving, meaning that the private company is incurring costs close to what they will incur when the prison is full. Yet a normal per diem reimbursement process may not provide adequate compensation for these costs.

Classification and Case Management

Contracts typically require the contractor to follow the Department's classification process, but several issues concerning classification will still need to be addressed. These include at least the following:

- Will the contract allow the contractor to change an inmate's custody status, or will the Department reserve that right? If the decision rests with the Department, what information will the contractor be expected to develop and contribute to the classification decision?
- If the facility includes more than one classification level, will the contractor be allowed to make tentative classification changes, subject to the Department's later approval?
- Does state law provide the contractor more than an advisory role in the classification process?
- Will the Department provide training in the use of its classification process?

⁵ See Clark, John, *Report to the Attorney General, Inspection and Review of the Northeast Ohio Correctional Center*, Office of the Corrections Trustee for the District of Columbia, 1998.

- Will the contractor be able to place an inmate in administrative segregation/protective custody, or will that decision, a form of classification, also rest with the Department? Presumably, the contractor would at least be allowed to make temporary placements, subject to DOC approval.
- Will the contractor have access to any automated inmate management system?

Grievances

Contracts routinely require the contractor to have a grievance system, most commonly the same system as the Department uses.

While the grievance system will probably allow an inmate to have a grievance considered by the Department Director or designee, some grievances will relate to matters that are uniquely of concern just to the contractor. The Department and the contractor should determine how such matters will be addressed, including how and when they will be referred for consideration by the Department.

Interpreters

If inmates unable to speak English are among those to be transferred to the private facility, provision will need to be made for interpreters. Sign language interpreters may be needed if inmates with serious hearing impairments are to be transferred. Providing interpreters may carry a cost impact.

C. Fiscal Management

Financial Strength of Company

The agency contracting with a private corrections company has a vital interest in knowing the financial stability of the company. The best RFP and contract negotiation efforts may be frustrated if the contractor goes bankrupt six months after the contract goes into effect. It may be possible to replace one management company with another in a relatively short time (top management may quickly leave a sinking financial ship). However, the bulk of the correctional staff is not likely to have this luxury. The agency should try to obtain information to allow it either to avoid the need for a takeover or give it as much advance notice as possible should financial difficulties arise.

The agency will want to ask for fiscal information in the RFP and include the financial strength of the company as a factor for evaluation. (See earlier discussion of this issue, p. 13) Additionally, the agency should consider including provisions in the contract that will allow it to monitor the financial strength of the provider during the life of the contract. This will enhance its ability to respond to

financial reverses that could threaten the company's ability to perform its obligations under the contract.

One state's contract requires the company to make available copies of documents filed with the Securities and Exchange Commission. Another requires annual certifications by the contractor as to any material adverse changes in the company's business condition. Annual audited financial statements from an independent Certified Public Accountant are required in another contract. Yet another requires annual audited financial statements demonstrating net stockholders equity of at least five million dollars.

Inmate Welfare Funds

Inmate welfare funds in some form are a standard feature in American prisons, both public and private. Traditionally receiving money from such sources as inmate commissary profits, inmate funds received a substantial boost in income with the growth of inmate telephone systems. Particularly because funds now may deal with substantial amounts of money, monitoring and auditing such funds is a legitimate concern of a contracting agency. The agency should consider:

- Setting guidelines or criteria for which moneys in inmate welfare funds may be spent;
- Creating auditing procedures to assure moneys are spent appropriately;
- Compliance with any applicable state laws; and
- Compliance with ACA Standards.

The most common means of setting guidelines for expenditures is through mandating that the private provider adopt the agency's policies and procedures on inmate welfare funds. If inmate welfare funds are computerized on an agency wide basis, requiring the contractor to use its system will generally address auditing concerns.

Inmates' Personal Funds

The contract should also address how the provider will handle and account for personal funds coming to inmates from work or other sources. The contract should reflect the applicability of state laws requiring portions of such funds to be taken for restitution, costs of incarceration, or for other matters. There may be circumstances when deductions from inmate personal funds could financially benefit the contractor, as would be the case if the contractor were allowed to make deductions for the cost of corrections and then keep that money. The agency should consider whether and how it would allow this to occur.

Will the agency require that the contractor adopt the agency's approach to inmate co-pay programs, such as a requirement that the inmate pay a certain amount for accessing the medical system? If the agency does not have such programs, will it permit the contractor to adopt them and if so, under

what limitations and level of oversight?

Payments: Timing, Amounts, and Adjustment

Contracts for private prison beds are, in large part, about when, how much, and under what conditions money for services is to be paid to the contractor. The most common form of payment is on a per diem basis, perhaps with a guaranteed minimum payment. The amount of per diem is typically an item for negotiation, as is any built-in escalator clauses. Payment is usually contingent upon the contractor providing adequate documentation, the nature of which the agency must decide. Various factors may be relevant, including circumstances that may preclude per diem for a particular inmate, penalties for vacant staff positions, or other areas of contract non-compliance. (These will be discussed later.) Once the documentation is received, the contract typically calls for payment within a fixed time period.

There are various ways the contracts address when an inmate “counts” for billing purposes. For instance, one contract states that payments will be based on a midnight count. Inmates on escape do not count for per diem purposes. Others state that the first day an inmate is at a facility is a billable day, but not the last.

Startup Costs and Advance Payments

Where placement of inmates in a new facility takes places over an extended period of time and payment is based on a per diem rate, a contractor may incur substantial financial burdens during the early part of the contract. Since the bulk of the operating costs are attributable to staff and other fixed expenses, the cost of operating a fully staffed prison will not change dramatically regardless of whether the prison houses one inmate or is completely full. Reimbursement during the startup period should recognize this circumstance.

To address this issue, one contract advances the contractor some initial start-up funding, with the advance to be deducted from later payments. Another approach is to allow higher payments during the ramp-up period, then progressively reducing payments until they settle into a predetermined per diem rate once the population approaches the expected final level under the contract. A third alternative allows the contractor to factor in its start-up costs as part of its general per diem, and amortizing these start-up costs over the life of the contract. This approach may lead to the initial per diem being set artificially high, a factor that becomes important when increases to the per diem fee structure are considered.

Guaranteed Payment Levels

Per diem levels are usually set in line with certain assumptions about the number of inmates to be placed in the facility made by the contractor and Department. However, if the Department is unable to

place as many inmates in the facility as anticipated, a per diem payment schedule may have the effect of imposing a severe monetary penalty on the contractor, forcing the contractor to operate at a loss. The Department should evaluate this contingency in planning for the contract and expect discussions to arise around this question in negotiating the contract.

The agency may want to consider setting variable per diem levels, depending on the number of inmates housed in a private facility. For instance, the Federal Bureau of Prisons pays a fixed price, based upon a fixed occupancy rate, that begins when the contract starts. If the occupancy exceeds the pre-established fixed level, only an incremental price is paid for the number of inmates exceeding that level.

Amendments to the Per Diem Rate

Escalator Clauses

Contracts extending over several years commonly include built in payment escalators. Increases might be tied to the Consumer Price Index, or a flat percentage per year. Another alternative is to negotiate fixed per diem increases as part of the original contract. Thus, hypothetically, the first year per diem might be \$50 per day, the second year \$52 per day, and so on.

Change in contract requirements imposed by outside sources

Contracts typically require the provider to comply with some (or all) DOC regulations, as well as with policies, federal and state laws, and standards from public and private accrediting agencies, Constitutional requirements and court orders. These regulations and requirements are liable to change during the course of a contract. Such changes may increase or decrease the cost of facility operations.

A contract clause could create a process by which the effects of such changes could be addressed. One example is a provision that allows either party to request a change in the per diem amounts based on changed circumstances. If the parties fail to reach an agreement on the proposed change, the contract calls for a dispute resolution process, defined in the contract, to be initiated. The dispute resolution process encourages the parties to negotiate and perhaps formally mediate disputes instead of turning them immediately into lawsuits.

Clauses that address changed circumstances and the costs of the contract should be drafted carefully so as to do no more than require the parties to negotiate changes. The state should take care to avoid positions where third parties, such as judges or arbitrators, could order increased per diems, which could have unforeseen and costly impact on the agency's budget.

When Will Per Diem Payments Stop?

The agency should consider under what circumstances it will stop paying a per diem relating to the care of an inmate, or impose reductions or conditions on such payments. For instance, it might make provision in the contract to suspend per diem payments to the contractor for inmates moved from an assigned facility to a hospital where DOC is paying the hospital related expenses. Similarly, per diems relating to staffing complements might be reduced or suspended when staff positions remain open longer than a predetermined period.

Insurance and Taxes

The contract should specify the types and amounts of insurance coverage the contractor is required to maintain. Be sure coverage is maintained for civil rights claims, practitioners advise.

As an example of the varied types of insurance jurisdictions require, one contract demands the contractor carry insurance for:

- Workmen's compensation
- General liability (which presumably includes civil rights coverage)
- Business automobile liability
- Owned and non-owned aircraft liability
- Umbrella/excess liability
- Professional and Medical liability covering nurses, attorneys, counselors, psychologists, and social workers
- Property/boiler and machinery
- Employee dishonesty
- Fire and property
- Business interruption insurance (which could be important in the event of a riot or natural disaster).

The amounts of coverage vary substantially. One state requires \$10 million per occurrence, another only \$1 million per occurrence with \$3 million aggregate.

Requiring that the contractor provide the state notice of the cancellation of any insurance policy is a prudent practice. This can be addressed by requiring that the government agency be a named insured on the policy, and provided with a right of notice of cancellation.

Performance Bond

Some states require performance bonds as a source of operational funds for the agency should the provider default in some way. However, a number of agencies do not require performance bonds, since

including a liquidated damages clause specifying that any damages imposed be paid from monies owed the contractor will typically provide the agency sufficient financial protection. Moreover, the government will typically wind up paying for required performance bonds, as the cost of the bond is likely to be included in the contractor's per diem rate. One observer wondered that if the government executes on the performance bond, whether the bonding company would expect to take over the contract, a generally undesirable result.

D. Contract Monitoring, Enforcement, and Dispute Resolution

How an agency monitors the performance of the contractor may be the single most important key to a successful contract. Although it is conceivably possible for a contractor to operate a facility in complete compliance with the contract, those with the most extensive experience with such contracts say compliance problems of some sort will predictably arise during the life of a contract, just as operational problems are predictable in publicly run prisons. An effective monitoring program allows the agency to identify problems early on, at a time when they are most easily corrected.

Monitoring properly focuses on compliance with the specific provisions of the contract. However, attention to detail should not preclude sensitivity to larger questions of the overall climate of a prison. "Climate" is difficult to objectify. Experienced corrections officials know that a prison that may comply chapter and verse with the specifics of a contract and still not be a safe and healthy facility. For instance, examination of disciplinary records may show that the prison is conducting its disciplinary hearings properly, but not reveal that the prison staff is failing to write infractions against inmates when sound corrections management says they should be.

While experienced correctional professionals may, quite accurately, get a sense that all is not right with a prison, such a "gut feeling" would not be enough to invoke the formal remedial or punitive clauses of a contract. However, when those same professionals are pressed as to why they sense problems with an institution, they usually can articulate more specific reasons or discover them upon further investigation. It will be important for the monitor to be able to discover those specific, contract compliance related issues.

Quality Control and Quality Assurance

There are two different aspects of contract oversight that fall under the general heading of "monitoring." One can be described as "quality control," where the primary responsibility falls upon the contractor to evaluate its own continuing level of compliance. The second can be described as "quality assurance," which involves monitoring by the government according to an established protocol. Methods of quality assurance are discussed in detail in the companion to this manual.⁶

⁶ Richard Crane, Monitoring Correctional Services Provided by Private Firms.

It will be described in at least some detail in both the RFP and the final contract. The RFP could specify a detailed quality control program the government expected of the contractor or, alternatively, could ask bidders to describe a quality control program they will provide, perhaps in accordance with a set of general goals. Giving the contractor the task of designing a quality control program provides another basis for evaluating proposals.

A quality control program in the hands of the contract provider is not a substitute for the agency's own quality assurance monitoring program. The latter is a necessity in all circumstances.

Enforcement Mechanisms Short of Termination

When one thinks of responding to a breach of a contract, the most common remedy that comes to mind is termination. But in most breach of contract situations, it will probably be in the state's best interest to give the contractor an opportunity to correct the problem(s), rather than terminating the contract. Abrupt termination creates obvious problems for the agency in finding another operator for the institution or finding alternative housing for the inmates. Litigation over the termination is also a possibility, but is inevitably a costly and time-consuming process.

Therefore, contracts typically give the agency means of addressing contract compliance problems short of termination. These include allowing the contractor a set time period in which to cure deficiencies, perhaps without further penalty, but backed up with contract language that allows the agency to take more punitive steps, often by imposing liquidated damages, should the contractor fail to do so. The contract should allow the Department discretion to select what remedy (ies) to invoke in a particular situation.

Corrective action plans

A common approach to dealing with deficiencies in contractor performance is to begin with a directive from the monitor or the agency that the contractor provide a plan of corrective action which will address the correction of an identified problem within a specific time limit. The contract can address this process in varying levels of detail, but at the least could specify who will have the discretion to determine the time a contractor will have to produce a plan of corrective action and in turn how much time the contractor will have to implement the plan successfully. The time allowed for each step, developing the plan, then implementing it, would be commensurate with the complexity and seriousness of the violation.

Liquidated damages

In many situations, problems of non-compliance warrant a response beyond asking just for a plan of correction, yet still falling short of terminating the agreement. Agencies commonly address this

middle ground through a liquidated damages clause, which allows the Department to impose damages in some amount based on the nature and duration of compliance problems and, typically, to deduct the amount of the liquidated damages from amounts otherwise due the provider.

Some contracts take a relatively general approach to the determination of liquidated damages. For instance:

“The amount of liquidated damages that may be withheld shall be determined by the Director and shall be proportionate to the level of service that is deficient or otherwise not in accordance with the Contract and in no event shall exceed \$5,000 per day.”

Others adopt a more structured approach under which the various topic areas of the contract are weighted and then multiplied by a set dollar value. For example, one state breaks its contract into five “service areas,” which are each assigned a base value of 1 – 5. Service area 1, with a value of 5, includes inmate classification, custody and movement, access to courts, disciplinary procedures, inmate relations, sentence reduction credits, sentence computation, and inmate records. Within a service area, different types of breaches are assigned different values. Thus, a “failure of staff” is assigned a value of 5 while a “failure to report” is assigned a value of 3. To compute the amount of liquidated damages, the service area value is multiplied by the value of the breach. This figure is then multiplied by \$25 per day. The resulting financial penalty can be substantial. “Collecting” liquidated damages is accomplished by providing that such damages may be withheld from monies the Department otherwise owes the contractor.

To forestall arguments over whether an amount of liquidated damages is inappropriately high, some states include a clause in which the parties acknowledge the liquidated damages schedule and formula and agree it is reasonable.

A clause which is intended to establish an agreed upon scale or measure of liquidated damages does not avoid serious disputes between the agency and contractor over whether in fact a breach of a contract provision has occurred. The agency will have to be prepared to prove a breach has taken place.

Liquidated damages clauses work best when applied to readily quantifiable areas of the contract. For instance, it is much easier to show that there are consistent errors in disciplinary proceedings than to show that staff is failing to write enough infractions, or is writing too many.

The Department should not bind itself to following any particular approach to responding to a contract breach. The contract should be clear that the Department retains the discretion to invoke any of the remedies the contract provides for responding to a breach, including termination.

Incentive Awards

While most contracts focus on imposing penalties for non-compliance, at least one jurisdiction’s

contract also takes the opposite tack, i.e., offering up to a 5% “award fee” over and above the base price of the contract.

Should a contract include some form of bonus award, the contract should include the criteria by which such awards would be given. The agency should expect some level of disagreement between agency and provider over whether bonuses should be awarded, and their size. Having clear criteria for the granting of bonus awards helps dispel accusations of favoritism between the government and a contractor. Granting of bonus awards should be made contingent on legislative appropriation. Also, in considering whether to include an incentive award program, the agency should evaluate whether the program will create a morale problem with its own employees, since laws typically would not permit such awards to be made to public agencies or employees.

Dispute Resolution

Disputes of varying magnitude between the state and private provider are inevitable. They may arise from compliance issues raised as part of the monitoring process, decisions by either party to terminate, or in response to a variety of other internal and external forces. Perhaps the most obvious area of potentially serious disputes is that of liquidated damages. The agency should expect the contractor to contest whether grounds exist to impose liquidated damages. Simply the parties talking together can resolve some disputes. Others can be addressed in hearing/appeal processes that may end with a final decision by the head of the Department of Corrections. Beyond these, the agency may wish to consider whether the contract should include an alternative dispute resolution process short of litigation.

Alternative dispute resolution processes, ranging from negotiation to mediation to formal arbitration, can result in the settling of disputes much more quickly and cheaply than litigation through the courts.

One contract requires the parties to go through a formal negotiation and mediation process, but stopped short of mandatory arbitration. Other contracts allow the parties to consent to arbitration on a case-by-case basis, but do not impose mandatory arbitration. One contract that included a mandatory mediation clause provided that the parties would split the costs of the mediation, set forth a particular process by which the mediation would be conducted, and specified how the mediator would be selected. Perhaps most importantly, the contract required a non-binding decision by the mediator within 30 days of the mediation hearing.

One of the more important areas in which to consider some sort of alternative dispute resolution will arise when the contract permits the department to invoke some form of penalties, such as liquidated damages, for contract non-compliance.

Most contracts specify a process by which the agency can find the contractor in non-compliance

with various aspects of the contract and thus trigger whatever punitive or remedial processes the contract contains, such as, corrective action plans or liquidated damages. There will be disputes over findings of non-compliance, and the Department should consider whether it wants to provide any sort of forum or mechanism short of litigation where the resolution of such disputes would be attempted. One alternative is to create a formal appeal process within the agency. This might begin with some form of a fact-finding hearing, and end with a decision by the agency Director. Another, perhaps complementary alternative involves presenting the dispute to an outside, neutral body for consideration, where some form of mediation or even arbitration would be attempted.

A relatively common area of disputes concerns monthly billings, especially where the correctness of the counts on which per diem payments are based have been called into question, or whether deductions for other sorts of problems, such as unfilled vacancies, were properly made.

One state addressed this reimbursement dispute problem by requiring that the state advise the contractor of reimbursement concerns on or before payment was due, but provided that all undisputed amounts of the monthly bill would be paid on time. The contract indicated that if the parties could not resolve the dispute within 30 days, either party could pursue its “legal remedies.” That contract had no formal alternative dispute resolution process, however.

Termination in General

Situations may arise when it is determined that continuing the contract while the contractor takes steps to correct deficiencies is not a viable alternative, and the agency is compelled to terminate the contract. There are two basic questions regarding contract termination that should be addressed in the contract: (1) what grounds are necessary to terminate the agreement, and (2) if the contract is terminated, what powers and duties does either party have to assure that the prison will continue to run and provide for the inmates housed in it pending their removal or finding a new management team to take over facility operations. Should the agency terminate the contract, some time will be necessary for it to make arrangements either to move its inmates to other facilities or to bring in a new management team to continue operation of the facility. Whether the latter is an option may depend on whether the Department either owns the facility or leases it from the private provider in an agreement that is separate from the operating contract.

Grounds For Termination

1. **Termination for convenience.** Contracts typically include a clause permitting the government to terminate “for convenience” whenever such action is deemed in the best interest of the State. This is a rarely used, draconian threat, which at least in theory allows the state to avoid having to

show any sort of cause to justify a termination. There is commonly some advance notice requirement as part of a termination for convenience clause. Agencies should review their state law to determine if invoking a termination for convenience clause will leave the agency liable for otherwise un-reimbursed costs incurred by the contractor. This possibility could deter terminating a contract under a termination for convenience clause.

2. Termination for cause. A clause should indicate what circumstances would give the state cause for terminating. Various contracts list the following sorts of circumstances:

- Bankruptcy or faltering financial circumstances of the contractor;
- Breach of the contractor's obligations under the contract;
- Unavailability of funds; or
- Destruction or condemnation of the property.

One state's contract provides immediate termination without prior notice to the provider if there is an imminent threat to life or property caused by the contractor's default. In other situations, the contract requires ten days notice.

Defining "default" is also important. Consider this language: "breach, cancellation, or persistent or repeated failure or refusal by a party to substantially fulfill any of its obligations under the contract" unless certain justifications are found to exist. Under this contract, the decision to terminate requires a "default." However, non-compliance with contract requirements that do not rise to the level of "default" allow the State to invoke other remedies, including monetary penalties.

3. Termination by mutual consent. The parties may agree that continuation of the contract is not in either of their interests. A clause that addresses this possibility and how the contract should be ended in such circumstances may smooth the termination process.

Agency Breach

Contract drafters should also consider what grounds, if any, might arise to justify the private provider terminating the contract. The most obvious is the failure of the government to pay its bills upon presentation of proper documentation.

Replacement Services

The department should consider what it would do with the inmates in a private facility should the contract end unexpectedly, as a result of termination or other circumstance. The most obvious option is

that the agency will simply return inmates to other prisons under its control. However, this may not be feasible if those other prisons are full. Even if space is available, it may take some time to transfer hundreds or even thousands of inmates. The contract should specify that the contractor remain responsible for adequately providing for inmates in the event of termination until such time as alternative arrangements may be made. If the Department owns the privately operated prison, or retains control over the premises by reason of a lease with the entity that does own the facility, it may be possible to replace the management of Company X with a management team from Company Y. Presumably the bulk of the employees of Company X will remain available to continue working in the prison.

The contract should also address the extent to which the original contractor is liable for additional costs the agency incurs as a result of a decision to terminate the contract.

In any event, planning for dealing with an unexpected end to the contract is something the Department should address internally and in the contract. One contract goes so far as to require the contractor to provide a plan, subject to the Department's approval, for the orderly transfer of control of the facility in the event of termination. This plan is to be provided relatively early in the contract period.

E. Physical Plant

Lease of facility

As noted elsewhere, the agency may reduce possible problems resulting from contract termination if it holds a lease on the facility that is not tied to the operations contract. This lease might include a purchase option.

Equipment and Supplies

Normally, the contractor is responsible for purchasing necessary equipment and supplies, often subject to exceptions for certain types of expenditures. These expenditures are to come out of the standard per diem that the contractor receives. But, what is to become of the equipment at the end of the contract?

Some contracts provide that all equipment becomes the property of the state at the end of the contract period. This approach may deter a contractor from making substantial expenditures for equipment as the contract nears its end. Another approach sets the expectation/duty that the contractor will purchase necessary equipment and the Department will buy it back at the end of the contract, subject to an agreed upon depreciation schedule. Still others simply allow the contractor to retain ownership of all property acquired during the contract.

Maintenance and Repair

Contracts typically specify that the contractor will be responsible for maintenance and repair of the facility. Additional requirements that appear in some contracts include:

- All additions and improvements at all times be unencumbered and lien free.
- A preventive maintenance program be maintained, using a particular computer software which presumably would facilitate an audit of the program.
- The contractor must create a reserve fund to pay for maintenance and repairs.
- A schedule for inspections by the state.

F. Security and control

Use of Force

Various legal questions can arise around the Department's ability to delegate its ability to use force against inmates through contract. This issue can become particularly perplexing with contracts for placement of inmates in an out-of-state prison. For instance, even if the agency has the power under its own state law to delegate its power to use force against inmates to a private party, how can that power be transferred to a party acting in another state? These questions are best resolved through the enactment of appropriate legislation.

Assuming the agency is comfortable that it has the legal power to authorize a private company to use force, including deadly force, against inmates, there is always the temptation to simply mandate the contractor to adopt the agency's existing use of force policy. This is an area where innovation may be possible, however. The agency may want to consider allowing the provider to propose its own force related policies, subject to the agency's review and final approval. If the agency is not comfortable with the provider's proposed policies, it then has the option of mandating use of its own policies and procedures.

In considering the approach it wishes to take regarding the provider's use of force, the agency may wish to remember the factors a court will examine in evaluating use of force under the Eighth Amendment:

- The need for force to be used;
- The amount used in relation to the need;
- The injuries sustained in the incident;
- The threat perceived by the reasonable officer; and
- Efforts to temper the use of force.⁷

⁷ *Hudson v. McMillan*, 112 S.Ct. 995 (1992).

Issues that might be addressed in the contract regarding use of force include, but are not limited to:

- The fundamental use of force policy.
- Adoption of a force continuum.
- Use of chemical agents, weapons such as batons, electrical devices, and other “mechanical” devices which are intended to allow officers to properly control inmates without having to resort to hand to hand combat. (Which of such techniques and devices, if any, will be allowed, and under what circumstances, with whose authorization, under what level of supervision. While such devices can be valuable tools for the officer, they are subject to abuse. The contract should be concerned about this possibility.)
- Types of force or holds that are not allowed, or are limited to certain situations (in some states, for instance, neck holds are considered deadly force.)
- Use of Restraints. (When are they permitted? Under whose authorization? For what periods of time? Periodic checks on well being of restrained inmates by custody, medical, and mental health staff. As with the use of chemical agents, the focus of the concern is the prevention of the abuse of restraints.
- Video taping of force incidents.
- Report preparation: (Who must prepare them? In what time frame? Content?
- What controls around preparation are imposed to assure the reports are accurate?)
- Supervision of uses of force.
- Training (initial and in-service).

Deadly Force

Although deadly force is rarely used, because its potential consequences are so great, it warrants special, careful attention. Can it legally be used by employees of a private contractor and if so, under what circumstances? What types of weapons are authorized? Do private Correctional Officers, when engaged in hot pursuit, have the authority to use deadly force when off institution grounds?

Escapes

The contract should address what obligations the provider will have regarding inmate escapes. Obviously, the contract should require immediate notification of escapes to local law enforcement and to the Department.

Beyond notification requirements, the contract should address the extent to which the contractor will be required to pursue an escapee and the extent to which pursuit off the grounds of the institution

(and the use of force in such pursuit) is authorized under state law. One contract speaks of hot pursuit within the boundaries of the facility. Another speaks of hot pursuit in “immediate areas until local law enforcement has taken control.”

In addition to addressing notification and pursuit questions, some contracts commonly provide that the contractor be responsible for costs associated with the pursuit, capture, and return of an escapee. In individual cases, this could be a very substantial sum. However, it may help local law enforcement agencies to be willing to promptly respond to an escape.

Emergency Responses

Emergency response capabilities are vital to any prison. These should include an institution’s internal ability to respond to the range of emergencies that can arise in the prison and links to law enforcement, fire, and other emergency response organizations in the community.

Emergency response capabilities is another area where the question arises as to whether the contractor should adopt a preparedness plan identical to the Department’s or, more generally, simply compatible with the Department’s and which meets its approval. In any event, there should be a requirement that emergency preparedness plans in a variety of areas are developed by the contractor and are subject to Department approval.

Some contracts include a clause that permits the Department to intercede in an emergency when the contractor is incapable of handling the emergency with its own resources. How such a clause might be triggered and who would trigger it presents serious questions. One state requires the contractor to notify the agency of any emergency it was not capable of handling, but leaves unspecified the question of how long the contractor must wait until essentially admitting defeat and requesting the agency’s aid. The issue becomes more complex if the contract also requires that the contractor pay the cost of any emergency intervention from local governmental authorities, such as police and fire agencies. In some cases, there is provision for the contractor to reimburse services provided by state agencies, such as the Department of Corrections.

Because of the concerns raised by the prospect of emergency situations, the agency will want to include in the contract, as well as subsequent operating policies, a clear definition of what constitutes an emergency and what are the notification requirements of the provider when an “emergency” arises.

Intervention by DOC personnel in emergency situations is always an option, except where geography prohibits it. Where DOC intervention is a possibility, specifying joint training for DOC and contractor emergency response teams in the contract is advisable. There should also be guidance in the contract as to what circumstances would prompt agency intervention, and of what kind. In situations where there is an on-site monitor, that person should also be involved in the decision to intervene.

Local Government Assistance

Local government assistance may be required in response to a variety of emergencies, including, but not limited to, fires, inmate disturbances, escapes, and natural disasters. The contract should address what types of local assistance may be necessary, and require the contractor to show it has satisfactory agreements with appropriate local agencies for the provision of such aid.

Power to Detain Persons

Will a private provider be able to detain persons suspected of criminal activity, pending arrival of the police? Note the importance here of agreements between the private provider and local law enforcement authorities, dealing not only with a response to suspected criminal activity, but also support in emergencies, such as major inmate disturbances.

Policies and Procedures Relating to Discipline

Contracts typically require the contractor to follow DOC disciplinary policies and procedures and specify that DOC disciplinary forms be used.

The extent to which the Department chooses to participate directly in the disciplinary process varies somewhat from jurisdiction to jurisdiction. This can range from requiring that DOC hearing officers preside over disciplinary hearings, to engaging DOC officials only consider formal appeals of hearing results, to the Department restricting its involvement to monitoring the disciplinary process.

Good Time

It may be neither legally possible nor appropriate from a policy perspective to permit the contractor to have direct control over an offender's release date by granting or removing good time. Yet the contractor will be the source of information about the inmate's performance in areas relevant to the decision to grant or deny good time, i.e., discipline, programming, overall behavior. It is advisable to ask the contractor to either provide raw information as to relevant factors or, additionally, recommendations on the good time decision, but have the agency retain its authority over release policies.

Other Issues

A department may wish to consider whether it wishes to impose additional requirements regarding discipline, including but not limited to such things as qualifications and training of hearing officers. While the degree of constitutionally-grounded court oversight of inmate disciplinary processes has waned somewhat after the Supreme Court decision in *Sanding v. Conner*, 115 Sect. 2293 (1995), the hearing officer still may make a substantial number of decisions of constitutional importance, making training for this legally sensitive position a special priority.

G. Food Service

Food service is a vital aspect of sound institution operation, and an essential part of any contract. ACA Standards provides important guidance in this area.

Contract provisions on food service may address such issues as:

- Food service administration;
- Special diets, both religious and medical;
- Sanitation practices and sanitation inspections, both by the contractor as part of its quality assurance program, and by government health departments (The Department will want to receive copies of any inspections by outside agencies.);
- Provision of recommended dietary allowances;
- Menu cycles;
- Nutritional analysis of the menu (one agency demands nutrient analysis on a daily, weekly, and monthly basis);
- Control of meal service, addressing such things as portion control, favoritism, and waste;
- Temperature control of food (hot foods hot, cold foods cold, temperatures maintained at proper levels for health purposes);
- Food service custody and security, including shakedowns and searches;
- Employee and inmate health examinations and health records; and
- Training.

H. Inmate Activities and Programs

Inmate Activities Levels

Inmate idleness can be a major contributor to inmate unrest. Organized inmate activities and programs will increase the cost of the contract. Contracts commonly address both what programs or activities will be provided and the length of time inmates should be occupied during the day.

One state demands that at least 80% of the population be involved full time (eight hours per day) in work assignments or training. Additional programming, such as life skills or substance abuse treatment, is considered outside the basic eight-hour requirement. Others require academic and vocational programming for designated percentages of the inmate population.

Accreditation

Where certification or accreditation of educational, vocational, or other types of programming is available, the agency may choose to require that such programs be accredited or certified by appropriate accrediting bodies.

Work and Industries Programs

It is common practice for operators of private prisons to be required to purchase materials from the state's prison industries program, so long as quality, price, and time of delivery are comparable to the private sector. The agency should consider what qualifiers it wishes to put on a "buy from Industries" clause. The contract should also address whether the Department will require the provider to provide space for an industries program, and specify how that program would be operated.

If a jurisdiction's prison industry program has been certified under the federal Private Sector/Prison Industries Enhancement Certification Program,⁸ the agency should consider whether the certification could be extended to industries programs to be created pursuant to the contract. Certified programs are required to make deductions from inmate earnings. Where such deductions should go is another area in which the contract should address.

Inmates' Work and Pay

The contract should also address issues relating to inmate employment, and specify whether inmates be required to work; if so, what wage scale will apply and will they be expected to contribute to the cost of their incarceration? Commonly, pay scales comparable to the DOC scales are required. Contracts sometimes specify that inmates work on facility operations and maintenance, but prohibit the contractor from benefiting financially from inmate work. In such cases, a clear indication of the meaning of "benefit financially" is indicated.

Commissary

The inmate commissary may generate substantial amounts of money and pay wages to inmate workers. The agency may want to include in the contract what is to become of Commissary revenues, what products will be offered and what prices the commissary will charge for what it sells, and how the Commissary revenues will be utilized.

⁸ See 18 USC § 1761 and Guidelines which appear at 64 Federal Register, Number 66, pages 17000 – 17014, April 7, 1999

Inmate Programs: Education, Training, etc.

What programming beyond work will be required? Some examples include:

- Basic orientation;
- An inmate assessment program (note this requirement should be coordinated with whatever other inmate assessment the Department may already have completed.);
- Educational programs (GED, higher education);
- Vocational programs;
- Substance abuse and other counseling programs beyond the basic mental health programming the contractor will be expected to provide;
- Recreation; and
- Library.

Where programs of various types are required, what standards will the Department wish to impose on the programs to help assure quality? Some contracts require accreditation of certain programs types where accreditation is available. Others speak of programs “comparable” to those operating at specified state institutions.

Drug Testing

The type of drug testing programs, if any, will the contractor be required adopt for both inmates and staff should be specified in the contract.

I. Health Care**Health Care Services**

Health care can be one of the more expensive and problematic aspects of prison operation. Issues about medical care are certainly among the most frequently litigated. Adequate medical care essentially involves assuring that any inmate in the institution can get timely access to qualified medical providers and, in turn, receive timely, appropriate treatment. The constitutional standard that the federal courts impose, not being “deliberate[ly] indiffer[ent] to serious medical needs,”⁹ is not an exceptionally demanding one. Yet serious legal problems can arise from any number of different aspects of a prison’s medical system, including the system’s basic organizational structure, its general operation, and its operation in specific cases. Health care services must include mental health services.

Accreditation

The delivery of sound medical services starts with a sound service delivery system. Most

⁹ *Estelle v. Gamble*, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976).

contracts address this through requiring that the private provider's medical system become accredited within a fixed time after the contract begins. Some agencies require accreditation through the National Commission for Correctional Health Care, others require only ACA accreditation. At least one agency requires accreditation by the Joint Commission on Accreditation of Health Care Organizations (JCAHO).

Staffing

Contracts typically address medical staffing, defining the professional qualifications for the medical staff and what hours and days doctors, nurses, dentists, mental health providers and other key medical staff must be available. These clauses also address the availability of emergency medical services.

In jurisdictions where 24 hours per day, 7 days per week medical staff is neither required nor available, the contract should address how medical needs will be addressed during hours when medical staff is not on duty.

Sick Call

Contracts may address the frequency with which sick call must be conducted, the qualifications of staff conducting sick call, and how quickly a medical provider must see an inmate after requesting to be seen. The contract may also prescribe a sick call procedure that allows ready verification of its proper operation.

Cost of Health Care

Major medical care will almost certainly be provided off site. Off-site care can become very expensive and disrupt the most carefully planned budget. While a Department may be able to absorb unexpected medical costs, imposing the same requirement on the contractor may prove to be the financial straw that breaks the camel's back.

Contracts typically provide that at some point, or to some degree, the Department will re-assume responsibility for the cost of health care for individual inmates. The contract should address the circumstances under which the cost of medical care reverts to the agency. Where a cost or time threshold is set, the contract should also require the contractor notify the Department when that threshold is reached.

Contracts often provide that after a certain period of time, inmates receiving off-site medical care will be transferred back to the custody of the agency or that the agency will take over payment responsibility. Other contracts shift the payment responsibility after off site medical bills exceed a given amount.

If the contract provides that at some point the Department will take over responsibility for out-

side medical expenses, the contract should provide for monitoring of referrals to outside medical providers, to guard against the contractor making too many referrals as a means of shifting medical costs from itself to the Department.

The contract may require the contractor to attempt to negotiate special rates with local hospitals as a cost savings measure. The Department may want to also consider attempting to negotiate similar agreements, if it anticipates taking over hospitalization costs from the contractor and not moving the hospitalized inmate to a different facility.

The contract should allow the Department to assure itself that off-site resources are available and open to inmates by, for instance, requiring that the provider have contracts with local hospitals.

Chronic illnesses may be treatable on-site, but still be very expensive. The Department will want to think through the issues involved in providing care and treatment indefinitely for inmates with chronic illnesses, such as tuberculosis or HIV disease, and determine to what degree it and the provider are respectively responsible.

Medical Records

Inmates' medical records will need to accompany them when they are transferred to and from the private facilities. The contract should specify the form and content of the medical records, probably requiring they be kept in a form consistent with Department medical records.

Transfers

How will transfers be coordinated so that medical records accompany the inmate and assurances exist that necessary medical care will not be disrupted when an inmate is transferred? This concern is particularly important when a transfer will require overnight stays en route.

Off-site Security

The contract should address how off-site security and transfers for medical care will be provided and whose cost responsibility these are.

Dental Care

What levels of dental staffing will be required? What sorts of dental services are required? Will preventive dental care be provided? How will emergencies be handled?

Ancillary and Specialty Services

The contract should address how ancillary and specialty services will be provided, including such things as pharmacy, radiology and lab, and optometric care.

Medical Programs

The Department will want to consider whether it wishes the contractor to provide other types of medical programs and services, such as health education, wellness programs, smoking cessation, or special illness or infectious disease programs, and specify them in the contract. Recent developments in health care standards and practices for infectious diseases prevalent in the inmate population, such as HIV disease and tuberculosis, make consideration of these programs more important than ever.

Sub-contracting Medical Services

Subcontracting may be of particular significance in the medical care area because of the prevalence of private prison medical companies. The RFP and the Contract should address this issue. If the primary contractor is to be allowed to sub-contract, the contract should specify to what extent the agency reserves the right to approve or disapprove the proposed medical provider.

Bi-lingual and Interpreters for Medical Services Operations

As elsewhere in other areas of operation, bi-lingual services for medical care will be necessary if non-English speaking inmates will be among those transferred. Other interpreter services may be necessary if, for instance, inmates with major hearing disabilities are transferred.

Inmate Co-pay Plans

There are a number of issues relating to the private provider's administration of inmate co-pay programs that will need to be addressed in the contract, namely:

- Will the contractor be (a) allowed or (b) required to have an inmate co-pay plan, under which inmates are charged a fixed amount for medical visits?
- How much will be charged, and what types of medical visits/care will have charges imposed and what types will not?
- What will become of the money collected from the plan?
- What means will inmates have to contest application of the co-pay rules in particular situations?

Inmate Deaths

The contract should address how inmate deaths will be handled. The following issues should be addressed in the contract:

- Who will be responsible for notifying next of kin?
- How rapidly must the contractor notify the Department?
- Who is responsible for the cost of returning the remains, and to where?

Public Health Reporting

The provider will be required to comply with various public health reporting requirements, contingent upon state law. The Department will probably want to impose additional reporting requirements on medical activity as part of its monitoring program.

J. Inmate Rights and Privileges

Access to the Courts

Inmates' Constitutionally protected right of access to the courts requires an affirmative response by prison officials to assure the right may be exercised in a "meaningful" manner.¹⁰ Historically, most agencies have attempted to meet their affirmative duty through the provision of law libraries, although the Supreme Court indicated in its early leading access to the courts case that access to law libraries or "persons trained in the law" could suffice.¹¹

The *Lewis* case may effectively reduce the scope of the right of access to the courts as the right had been generally understood prior to that decision. At the very least, the case clearly encourages agencies to experiment with methods other than law libraries.

Law libraries of the sort required by pre-*Lewis* decisions are substantial investments of both money and space. They require constant upkeep. Physical access to libraries can become management problems for the institution, especially when dealing with inmates housed in segregation. Also, law libraries alone cannot provide meaningful access to the courts for an inmate who cannot read. For these sorts of reasons, private companies have, at least on some occasions, chosen to provide attorneys for inmates, instead of libraries. One knowledgeable observer of both inmate rights and private prison development argues that provision of access to lawyers is a preferable alternative to law libraries.¹²

The area of access to the courts then would appear to be one in which an agency will want to consider carefully whether it wants the private contractor to adopt the agency's approach to providing access to the courts (which in most cases will depend heavily on law libraries) or whether it want to permit the provider to try to take advantage of what *Lewis* offers. Alternative approaches would range from

- Providing law libraries – the traditional approach;
- Providing libraries of considerably reduced size;
- Leaving the provider the option of providing libraries, paralegals, or lawyers, or any combination thereof; and

¹⁰ *Lewis v. Casey*, 518 U.S. 343 (1996).

¹¹ *Bounds v. Smith*, 430 U.S. 817 (1977).

¹² Richard Crane, Crane on Corrections, VI *Correctional Law Reporter* 67 (February, 1995), VII *Correctional Law Reporter* 55 (Dec./Jan., 1996).

- Providing lawyers, perhaps with the proviso that they are limited to assisting only in attempting to negotiate inmate issues with the prison, and the drafting and filing of complaints but cannot continue to represent the inmate after the complaint is filed.

Where methods that might be considered experimental are permitted, the agency should monitor these carefully. If successful, these methods could serve as models for the agency changing its general approach to this question. Should the methods prove unsuccessful, the agency could potentially share liability for such failure. However, the liability exposure for a carefully designed experimental plan that a court later found unacceptable should not be substantial.

Regardless of how the agency chooses to approach the law library/access to persons trained in the law issue, the contract should address the need for inmate access to notaries, supplies such as paper, pens, and typewriters, and copying services.

Mail, Visiting, and Telephones

The contract must address how the provider will provide for mail, visiting, and inmate telephone access. The most common model is to require the provider to adopt and follow DOC policies on these issues. If the contractor is permitted to adopt its own policies and procedures, or alter DOC policies, the agency should retain a “review and approval” power.

Special provisions will need to be made for handling legal mail and attorney-client visits. It may also be necessary to provide some means of allowing confidential telephone calls between lawyer and inmate client.

There probably will be an inmate pay telephone system in the prison. The agency should consider the extent to which it wishes to control or dictate expenditure of revenues from the system and the level of accounting controls it wishes to impose.

There has been a certain amount of controversy recently over the amount charged for inmate telephone calls, with some groups claiming that the collect call fees are so high as to amount to gouging. The agency may wish to consider whether it will impose any sorts of controls in this area.

While inmate telephone calls are commonly monitored, the agency should verify that the private provider has the legal authority to monitor inmate calls.

Religion

Does the Department wish to put an emphasis on religious programming? What staffing requirements for religious leaders are desired?

Does the population to be transferred have any minority religious groups that have special

requirements that the Department wants the contractor to address, such as dietary requirements and ceremonial needs of Native American, Jewish, or Muslim prisoners?

Resolving Religious Conflicts

Conflicts between inmates wishing to engage in various religious activities and the prison are common, and are often the subject of litigation. Examples include such things as inmates wishing to attend congregational services, wishing to wear long hair or beards, have special diets, wear religious articles, possess religious literature which the institution may feel presents a security threat. Sometimes there are questions of whether an inmate's expressed beliefs and practices are even "religious."

Experience over the last couple of decades shows that while some corrections managers feel very strongly about restricting certain religious practices (typically in the name of furthering facility security), agencies that have chosen to tolerate such practices have done so without encountering significant problems. A prime example of this is the varying approaches correctional agencies take to inmate hair and beard length. While this is not the appropriate forum to debate whether or not inmates should be allowed to grow long hair and beards, suffice it to say that the contract should address both how the contractor will address such questions and the extent to which the Department wants to participate in such decisions. For instance, if the department takes one approach to a particular religious practice, it probably will not want the contractor to take the opposite approach. However, if a question about restricting a particular practice arises for the first time in the private prison, the Department probably will want to play a substantial role in the resolution of that question.

Volunteers

Given the breadth of religious beliefs and practices that will be encompassed in a large inmate population, agencies commonly rely heavily on volunteers to assist in ministering to the religious needs of inmates, as well as responding to their need and interest in having contact with free world volunteers who can help respond to their alcohol and substance abuse treatment, educational, and vocational needs. The contract should address the Department's expectations regarding such matters as seeking, screening, training, and overseeing volunteers.

Welfare Fund

As noted earlier, there are a host of issues the contract will need to address relating to the inmate welfare, notably:

- Will there be some form of an inmate welfare fund?

- What will its sources of money be?
- What can monies from the fund be spent on?
- What sort of accounting requirements must be followed and will those be the same as the rest of the Department's?

K. Staffing and Training

Staffing

The contractor's proposed staffing pattern for the prison will typically be included in its response to the RFP and then incorporated into the final contract. Changes in the staffing pattern will require DOC approval.

Some contracts specify minimum qualifications for positions, sometimes identical to those maintained by the Department.

When a new facility is opened, inexperienced staff can undermine the success of a start-up operation. At least one state requires that 30% of security personnel have at least one year of experience in law enforcement or corrections. Experience is especially important for supervisors and managers. The contract should specify what levels of background checks the contractor will be required to perform in screening new employees and how this will be done. The results of these checks should be available to the Department. Other issues that need to be addressed include:

- Will the contractor be allowed to hire ex-felons? Will it be allowed to hire former DOC employees? One state allows ex-felons to be hired with DOC approval. Another prohibits the contractor from hiring former DOC employees without a Department recommendation.

Vacancies

Public correctional agencies often attempt to address budget problems by imposing hiring freezes or delaying the replacement of staff that leave the agency. Money may be saved, but as a result, the agency's ability to fulfill its mission may be compromised. Clearly, in the context of a prison, if positions in the custody chain of command are left unfilled, facility security may be weakened.

Private providers may attempt to save money in the same way, and face the same risks. This possibility raises two questions (1) do empty positions threaten security?, and, (2) Should agencies have to pay for posts or positions that are not filled?

Contracts typically address the vacant position issue in ways that attempt to recognize that positions will become vacant, which set expectations for vacant positions to be filled within reasonable time

periods, and which impose some sort of financial penalty if they are not. Here is one example:

The contractor shall notify the Department Contract Monitor in writing within three working days after the date a position becomes vacant. If a position is left vacant for more than 30 days for security staff and 60 days for all other staff, the Contractor will incur a financial penalty [set in accordance with a penalty schedule elsewhere in the contract].

However, the contractor may, prior to the expiration of the 30 or 60-day periods, request that the Department grant an extension of 30 days. The request for extension must include: 1) evidence that the contractor has diligently advertised the vacant position, and 2) copies of all applications or resumes submitted for the vacancy. The Department may, at its sole discretion, grant on 30-day extension.

Another contract allows the financial penalty to be reduced if a post is filled with someone with less than complete qualifications, e.g., when a licensed practical nurse (LPN) is assigned to serve in the capacity of a registered nurse (RN).

Should the contract or monitoring processes address the situation where a vacant position is filled by transferring a staff member from another position? This could be done by the contractor to avoid incurring the penalty for not filling the position but would still leave the basic problem – a staff shortage – uncorrected.

Personnel records

The Department may wish to specify the content of personnel records and that the Contract Monitor and/or other DOC officials have access to those records.

Hiring Preferences

Should a private facility be replacing a state run facility, the agency may consider requiring the contract to give a hiring preference to state employees susceptible of losing their jobs when the state facility closes. Other hiring preference issues that may need to be reflected in the contract include:

- Does the agency want to require the contractor give some hiring preference to in-state residents?
- Does the agency want to require the contractor give some hiring preference to residents from the immediate area in which the facility is located?

It should be noted that the goal of imposing hiring preferences based on place of residence is likely to conflict with the goal of opening the facility with as many experienced staff as possible.

Part Time Employees

One contract allows part time employees if fully trained and certified, but prohibits their being used to fill a vacancy in a full time position. It also prohibits their use in supervisory positions.

Training

Proper training helps assure staff quality and helps reduce liability. Compliance with ACA Standards can help agencies identify and address many training related questions, but some will still remain.

Training presents a dilemma similar to that related to policies and procedures. Does the agency wish to mandate that contractor employees receive precisely the same training as comparable state employees receive, or allow the contractor to submit its own training package, subject to state review and approval? Some states adopt the latter approach with the mandate that the contractor at least provide the same number of hours of pre-service and in-service training as state correctional employees receive. It is common that the Department reserve the right to approve both the form and content of training.

It is common that the Department reserve the right to approve both the form and content of training. The agency may want to evaluate how the contractor delivers required training. Unless the contractor is provided access to a state academy, it may have difficulty assembling enough new employees for a training class. The agency should also consider what tasks, if any, a new recruit will be permitted to perform before completing all or part of the mandated formal training.

Labor Disputes

Some states incorporate a “no strike” clause in their contracts. Regardless of whether a no-strike clause appears in the contract, the contract should require the provider to address how it will respond to a strike, work stoppage, or other labor dispute should such actions occur.

Compensation and Employee Benefits

What controls, if any, does the agency wish to assert over wages paid by the contractor? Options include leaving wages totally up to contractor discretion, requiring the contractor to pay prevailing wages, or demanding wages precisely match those paid state employees. Similar questions arise around the benefit package the contractor offers its employees.

Volunteer and Volunteer Oversight

The contract probably will encourage the use of volunteers in a variety of ways. The Department should consider the nature of the screening, training, orientation, and supervision requirements it wants to impose on the contractor. Note also that a paid volunteer coordinator will add cost to the contract.

L. Indemnification and litigation

Indemnification and Litigation

Contracts uniformly include an indemnification clause under which the contractor is to defend

and hold harmless the state and state officials from any lawsuit which, in the words of one contract, arises from “the performance, acts, or omissions under the Contract by the Contractor or any of its officers, agents, representatives, employees or subcontractors or arising from or related to a failure to comply with any state or federal statute, law, regulation or rule by the Contractor or any of its officers, agents, representatives, employees or subcontractors.” In other words, if the suit arises from something the contractor or persons acting on the contractor’s behalf did, the state is protected from the costs of liability and the cost of defending the suit.

It is important in drafting the indemnification clause to be sure it extends to all types of lawsuits that might arise from the operation of the prison. Not all of these are civil rights claims filed by inmates. For instance, can a private party injured by an escapee bring a lawsuit against the prison or prison officials? This type of case is allowed in at least some jurisdictions.

Some contracts attempt to list all the types of claims which contracts address. Here is a sample:

- Any and all liability, claims, damages, losses, expenses, actions, attorney fees and costs and lawsuits, whatsoever, including without limitation;
- Civil rights claims;
- Negligence claims;
- Damage to real or personal property;
- Arising from escape or attempted escape;
- Claims of infringement of a patent, copyright, trade secret or trademark;
- Discrimination;
- Minimum wage;
- Unfair employment practices;
- Claims arising from publication of and data processed under the contract.

Cooperation

Despite indemnification clauses, cooperation between the agency and contractor will be important in suits where both are named as defendants. Some contracts include clauses requiring cooperation between the two parties in defending claims against either. Others provide that where the contractor is involved in the actual defense of state employees, the contractor must use counsel satisfactory to the state unless an insurance carrier conducts the defense.

Notice of Lawsuits

Since important clocks start running when complaints in lawsuits are filed, it is important that both the agency and the provider communicate closely and quickly when served with litigation. The con-

tract should address what notice one party wants of suits filed against the other, how rapidly that notice should occur (one contract speaks of 24 hours, another of 10 working days), and to whom the notice (and probably copies of the initial pleadings) should be sent.

Settlements

The contractor may be defending and indemnifying state employees against damages claims. It also may be defending claims that seek some form of injunctive relief where a court order could have a significant impact on the manner in which the facility is run. The effects of such orders could easily ripple back into the Department of Corrections as a whole. In either situation, the agency could have a vital interest in the nature any settlement might take. Some contracts include a clause that forbids the contractor from entering into any settlement without the written consent of the state.

Habeas Corpus

While the most common type of inmate lawsuit to correctional administrators is the civil rights claim brought in federal court pursuant to 42 USC § 1983, inmates also commonly challenge the legality of their convictions in habeas corpus proceedings, which may be filed in either state or federal court. Habeas proceedings commonly name the custodian of the inmate as the respondent, i.e., the prison warden.

Contracts should address the matter of habeas petitions and the most common method of doing this is to provide that the state will continue to defend this type of lawsuit.

The contract should also address the means by which notice of a habeas case, which is served on the private provider staff, will be sent to the appropriate state official and who that official is.

* * *

Conclusion

This document does not attempt to provide all the answers to drafting a successful contract for private prison beds. Nor does it attempt to offer a “model contract.” There is no “one-size fits all” contract for private prison space. The best contract is one drafted to meet the unique needs and expectations of a jurisdiction, needs and expectations that the jurisdiction has carefully identified, defined, and refined through careful thought and planning.

However, there are issues and concerns that are common to the great majority of private prison bed contracts and this document attempts to identify at least most of those common issues. From the contents of these pages, it is our hope that the agency approaching the contracting decision may be better able to focus its thinking, understand questions it should ask itself and potential contractors, learn from and build upon the experience of others, and produce a contract that allows it to successfully meet its mission and goals.

* * *

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Hudson v. McMillian, 112 S.Ct. 995 (1992)

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Although not necessarily cited in the text, Contracts and / or Requests for Proposals from the following states were source material for this document:

Alaska

Georgia

Idaho

Louisiana

Michigan

Mississippi

Montana

New Mexico

North Carolina

Ohio

Oklahoma

Tennessee

Texas

The Federal Bureau of Prisons

Appendix A

The following are pages demonstrate the evaluation processes and criteria used in contracts from Idaho and Ohio.

Proposal Review Process Summary

The Review and Evaluation Process

- A Kick-Off meeting was conducted with the DOC Proposal Review Teams on Monday – August 18. A schedule for the reviews was established. Key dates included:

Organize the Evaluation teams	Aug 6 – 19.
Team 1 & 2 Reviews	Aug 19 – Sep 8
Team 3 Review and Scoring	September 8 – 15
Interviews and Site Visits (If needed)	Sep 15 – 26
Recommendation for Award	Sep 26.

- Team 1 and 2 reviews involved team members reviewing the submittals (either independently or in small groups) and noting their comments on the checklists provided. Some reviewers produced matrices or other summary information. Several meetings were conducted with Teams 1 and 2 to discuss issues and questions.
- CRSS Constructor's staff provided coordination and support for the review teams. They also conducted independent review of the proposals, and assisted in the review efforts of teams 1 & 2. They collected detailed design evaluation information and prepared a number of matrices and graphics to help compare the proposals, which are included in the attached material. CRSSC facilitated review meetings for Teams 1, 2 & 3, and assisted in the reference checks.
- During the week of September 8 - 12, Team 3 met at the CRSS Constructors Boise Office Conference room to score the proposals. During the scoring round, Team 3 conducted detailed, candid discussions of the proposals and evaluation material, questioned the Team 1 & 2 members regarding their findings and produced a single (consensus) scoring, based upon the scoring criteria described in the RFP.

The agenda for the week consisted of the following:

Monday – Tuesday Presentations of evaluations by Teams 1, 2, and CRSSC staff
Detailed discussions of the evaluations and issues

Wednesday – Friday Proposal scoring and detailed discussions

- Team 3 used the scoring criteria described in the RFP:

Proposal Area:	Maximum Points:
Facility Development	175 Points
Development Cost	150 Points
Correctional Services Quality	175 Points
Correctional Services Cost	150 Points
Architect/Engineer Qualifications	50 Points
General Contractor Qualifications	50 Points
<u>Offeror Qualifications</u>	<u>150 Points</u>
Total – Maximum Points	900 Points

- By the end of the day Friday, September 12, Team 3 had completed their reviews and scoring of the individual criteria. They adjourned for the weekend, instructing CRSSC staff to prepare a final tabulation of the scoring.

1250 Bed Med/Min Men's Prison
Idaho Department of Corrections

Revised Score Summary Sheet

Category	Max Points
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Development Proposal									
Cell Housing Layout	26.25	21.00	13.13	13.13	10.50	21.00	18.38	13.13	7.88
Dorm Housing Layout	26.25	15.75	18.38	13.13	0.00	21.00	10.50	13.13	7.88
Site Layout & Circulation	26.25	18.38	21.00	21.00	15.75	18.38	7.88	7.88	5.25
Future Expansion	26.25	5.25	21.00	21.00	13.13	13.13	5.25	15.75	13.13
Medical Layout	17.50	14.00	8.75	14.00	15.75	17.50	12.25	12.25	17.50
Food Service Layout	17.50	17.50	10.50	17.50	15.75	12.25	12.25	10.50	12.25
Administration Layout	8.75	5.25	6.13	6.13	7.00	3.50	8.75	7.88	4.38
Indoor Recreation Layout	8.75	6.13	6.13	8.75	0.00	7.00	7.00	2.63	7.88
Vocational/Academic Layout	8.75	7.00	6.13	6.13	7.88	8.75	6.13	8.75	7.88
Industries Layout	8.75	8.75	5.25	7.00	6.13	8.75	5.25	7.00	7.00
Subtotal	175.00	119.00	116.38	127.75	91.88	131.25	93.63	98.88	91.00
Category Ranking		3	4	2	7	1	6	5	8

Development Cost	150.00	139.00	149.00	150.00	93.00	118.00	134.00	79.00	103.00
Category Ranking		3	2	1	7	5	4	8	6

Correctional Services Proposal									
ACA Accreditation	26.25	7.88	15.75	18.38	0.00	21.00	21.00	0.00	0.00
Staffing Plan	26.25	26.25	10.50	21.00	18.38	18.38	23.63	10.50	10.50
Staff Experience	7.00	3.50	3.50	3.50	0.00	7.00	7.00	0.00	0.00
Staff Training Program	26.25	10.50	10.50	23.63	13.13	26.25	18.38	10.50	18.38
Security Staff Numbers	26.25	15.75	10.50	21.00	13.13	23.63	13.13	26.25	23.63
Food Service Plan	7.00	7.00	7.00	3.50	7.00	6.30	3.50	7.00	7.00
Maintenance Plan	8.75	7.00	6.13	5.25	7.00	7.00	2.63	1.75	5.25
Academic Program Participation	7.00	0.00	0.00	7.00	0.00	7.00	7.00	0.00	7.00
Hab/Rehab Program	7.00	4.20	4.20	2.80	2.80	6.30	7.00	1.40	7.00
Inmate Work Program	7.00	7.00	7.00	7.00	7.00	4.90	7.00	7.00	7.00
Quality of Plan	26.25	13.13	13.13	26.25	7.88	26.25	15.75	7.88	10.50
Subtotal	175.00	102.20	88.20	139.30	76.31	154.00	126.00	72.28	96.25
Category Ranking		4	6	2	7	1	3	8	5

Per Diem Cost	150.00	150.00	145.00	120.00	108.00	117.00	143.00	105.00	114.00
Category Ranking		1	2	4	7	5	3	8	6

AE Qualifications									
No. of Corrections Projects	25.00	25.00	17.50	25.00	12.50	25.00	25.00	5.00	17.50
No. of Beds Designed	25.00	25.00	17.50	25.00	12.50	25.00	25.00	5.00	17.50
Subtotal	50.00	50.00	35.00	50.00	25.00	50.00	50.00	10.00	35.00
Category Ranking		1	5	1	7	1	1	8	5

GC Qualifications									
No. of Corrections Projects	25.00	20.00	15.00	10.00	25.00	22.50	15.00	25.00	12.50
No. of Beds Constructed	25.00	20.00	15.00	10.00	25.00	22.50	15.00	25.00	12.50
Subtotal	50.00	40.00	30.00	20.00	50.00	45.00	30.00	50.00	25.00
Category Ranking		4	5	8	1	3	5	1	7

Offeror Qualifications									
Net Worth	60.00	30.00	30.00	54.00	54.00	60.00	30.00	30.00	12.00
Beds Under Contract	45.00	22.50	22.50	36.00	9.00	45.00	22.50	13.50	4.50
Local Team Partners	30.00	0.00	24.00	15.00	0.00	24.00	0.00	6.00	9.00
Aggregate Service Quality	15.00	10.50	7.50	13.50	6.00	15.00	12.00	6.00	9.00
Subtotal	150.00	63.00	84.00	118.50	69.00	144.00	64.50	55.50	34.50
Category Ranking		6	3	2	4	1	5	7	8

Total Score (Rounded)	900	663	848	728	513	759	641	471	499
Overall Ranking		3	4	2	6	1	5	8	7

PART FOUR: EVALUATION OF PROPOSALS

Disclosure of Proposal Contents. The State will seek to open the Proposals in a manner that avoids disclosing their contents. Additionally, the State will seek to keep the contents of all Proposals confidential until the Contract is awarded. The State will also prepare a registry of Proposals containing the name and address of each offeror. The registry will be open for public inspection after the Proposals are opened.

Rejection of Proposals. The State may reject any Proposal that is not in the required format, does not address all the requirements of this RFP, or that the State believes is excessive in price or otherwise not in its interests to consider or to accept. In addition, the State may cancel this RFP, reject all the Proposals, and seek to do the Work through a new RFP or other means.

Evaluation of Proposals Generally. The evaluation process may consist of up to four distinct phases:

1. The Procurement Representative's Initial Review of all Proposals for Defects.
2. The Evaluation Committee's Evaluation of the Proposals.
3. Request for More Information (Interviews, Presentations, and/or Demonstrations).
4. Negotiations.

It is within the purview of the evaluation committee to decide whether phases three and four are necessary. The evaluation committee will initially make this decision before the evaluation process begins. But the committee has the right to eliminate or add phases three and/or four or add or remove sub-phases to phases two through four at anytime if the committee believes doing so will improve the evaluation process.

Clarifications. During the evaluation process, the Procurement Representative or the evaluation committee may request clarifications from any offeror under active consideration and may give any offeror the opportunity to correct defects in its Proposal if the Procurement Representative believes doing so does not result in an unfair advantage for the offeror and it is in the State's interests to do so.

Initial Review. The Procurement Representative will review all Proposals for their timeliness, format, and completeness. The Procurement Representative will normally reject any late, incomplete, or incorrectly formatted Proposal, though the Procurement Representative may elect to waive any defects or allow an offeror to submit a correction.

If a late Proposal is rejected, the Procurement Representative will not open it or evaluate it for format or completeness.

The Procurement Representative will forward all timely, complete, and properly formatted Proposals to an evaluation committee, which the Procurement Representative will chair.

Committee Review of the Proposals. The evaluation committee will evaluate and numerically score each Proposal that the Procurement Representative has forwarded to it. The evaluation will be according to the criteria contained in this Part of the RFP. An attachment to this RFP may further refine these criteria, and the committee has a right to break these criteria into components and weight any components of a criterion according to their perceived importance.

The committee may also have the Proposals or portions of them reviewed and evaluated by independent third parties or other State personnel with technical or professional experience that relates to the Work or to a criterion in the evaluation process.

The committee may also seek reviews of end users of the Work or the advice or evaluations of other State committees that have subject matter expertise or an interest in the Work.

In seeking such reviews, evaluations, and advice, the committee will first decide, in writing, how to incorporate the results in the numerical scoring of the Proposals. The committee may adopt or reject any recommendations it receives from such reviews and evaluations.

The evaluation will result in a point total being calculated for each Proposal. Those offerors submitting the highest rated Proposals will be scheduled for the next phase. The number of Proposals forwarded to the next phase will be within the committee's discretion, but regardless of the number of Proposals selected for the next phase, they will always be the highest rated Proposals from this phase.

At any time during this phase, the committee may ask an offeror to correct, revise, or clarify any portions of its Proposal.

The evaluation committee will document all major decisions in writing and make these a part of the contract file along with the evaluation results for each Proposal considered.

Proposal Evaluation Criteria. In the Proposal evaluation phase, the committee will rate the Proposals submitted in response to this RFP based on the following criteria and the following weight assigned to each criterion:

RFP Requirements	Weight	Does Not Meet	Meets	Exceeds	Greatly Exceeds
Cover Letter/Executive Summary	1	0	5	5	5
Offeror Profile	1	0	5	7	9
Staffing Plan and Replacement Contingency	1	0	5	7	9

Offeror's Mandatory Qualification & Experience:

RFP Requirements	Weight	Does Not Meet	Meets	Exceeds	Greatly Exceeds
Two (2) years experience in providing educational programs in a classroom setting	4	0	5	7	9
Two (2) years management experience involving human resources, budget and management as well as administration and operation of a program or business	4	0	5	7	9
Three (3) references reflecting the offeror's experience providing educational, employment, or social programming services	4	0	5	7	9

Offeror's Desirable Qualification & Experience:

RFP Requirements	Weight	Does Not Meet	Meets	Exceeds	Greatly Exceeds
Five (5) years experience providing educational program development	4	0	5	7	9

Evidence of curriculum development:					
Examples of programs including number of participants, length of program, class size, hours worked, both in preparation and instruction to support the program	4	0	5	7	9
Evidence of programs developed for students not suitable for conventional mainstream instruction	4	0	5	7	9
Five (5) years experience providing training in adult educational program development	4	0	5	7	9
Two (2) years experience in employability program development	4	0	5	7	9
Examples of community linkage programs, relative to geographic diversity within Ohio, relative to demographic diversity of age groups served, and relative to cultural diversity of population served	4	0	5	7	9
Two (2) years experience providing training and occupational counseling in adult employability skills	4	0	5	7	9

Personnel Mandatory Requirements:

RFP Requirements	Weight	Does Not Meet	Meets	Exceeds	Greatly Exceeds
Completion of courses required for associate degree in social or behavioral science, criminal justice, education, or comparable field	2	0	5	7	9
Experience in oral communication	2	0	5	7	9
Experience in record keeping	2	0	5	7	9
Experience in report writing	2	0	5	7	9
Experience in interviewing	2	0	5	7	9
Signed statement of compliance		0	5		
Three references from organizations that have received services from the proposed candidate within the past ten (10) years	2	0	5	7	9

Note: The skill levels required for oral communications, recordkeeping, report writing, and interviewing techniques will be ascertained from the Personnel Profile Summary forms and resume. The resume must also reflect in detail the applicant's experience in oral communications, recordkeeping, report writing, and interviewing techniques. Consideration will be given for special training, relevant classwork, teaching and work related activities. All public and private involvement in the specified areas should be narrated in adequate detail to represent intensity/complexity levels to aid evaluation.

Personnel Desirable Requirements:

RFP Requirements	Weight	Does Not Meet	Meets	Exceeds	Greatly Exceeds
Completion of undergraduate core program in social or behavioral science, criminal justice, education or comparable field	2	0	5	7	9
Two (2) years experience in adult education and testing	2	0	5	7	9
Two (2) years experience in occupational counseling	2	0	5	7	9
Knowledge and understanding of community linkage programs through social service agencies	2	0	5	7	9
Demonstrated experience delivering educational services to diverse groups	2	0	5	7	9

Other Technical Requirements:

RFP Requirements	Weight	Does Not Meet	Meets	Exceeds	Greatly Exceeds
Work Plan	1	0	5	7	9
Implementation Plan:					
A. Explanation of how the 15, ½ day instructional sessions will accomplish the program goals identified in the RFP	1	0	5	7	9
B. How the offeror plans to meet varied needs of program participants	1	0	5	7	9
C. Plan that will be used to achieve the highest completion rate of program goals	1	0	5	7	9
Program Goals and Objectives Description					
A. Offeror must address all program goals, primary objectives, & specific requirements	8	0	5	7	9
B. Identify the assessment instrument(s) to be used in career counseling	8	0	5	7	9
Curriculum/ Lesson Plan	Weight	Does Not Meet	Meets	Exceeds	Greatly Exceeds
A. Detailed description and listing of curriculum for each training session, to include a lesson plan (for at least 15 class sessions) and time frame for each module. The program description, areas of instruction and activities must be clearly stated and cover the requirements in the RFP					
1. Employment Readiness	10	0	5	7	9
2. Life Coping Skills	5	0	5	7	9
3. Community Resources	5	0	5	7	9
4. Retirement/Disability Planning	5	0	5	7	9

Employment Plan					
A. Offeror must submit a detailed employment plan to demonstrate connection between proposed activities and gaining employment for participants	5	0	5	7	9

Once the technical merits of a Proposal are considered, as described above, the costs of that Proposal will be considered. But it is within the committee's discretion to wait to factor in a Proposal's costs until after any interviews, presentations and discussions are held. Also, before evaluating the technical merits of the Proposals, the committee may do an initial review of costs to determine if any Proposals should be rejected because of excessive cost. And the committee may reconsider the excessiveness of any Proposal's cost at any time in the evaluation process.

Before considering costs, the committee will first adjust the cost of the Proposals to factor in the preference given to Ohio-based offerors in Section 125.09 of the Code, if applicable. The committee will then divide the offeror's total not-to-exceed fixed price for the Work by the Proposal's totaled score based on the points received from the evaluation of the Proposal's technical merits. One or more of the Proposals will then be selected for further consideration in the next phase of the evaluation process. The Proposal(s) selected to be considered in the next Phase will always be the highest-ranking Proposal(s) based on this analysis. That is, the committee may not move a lower ranking Proposal to the next phase unless all Proposals that rank above it are also moved to the next phase, excluding any Proposals that the committee disqualifies because of excessive cost or other reasons. Alternatively, if there are to be no more phases because the committee feels they are unnecessary or inappropriate, the proposal with the lowest cost per point ratio will be awarded the Contract.

If the committee finds that one or more Proposals should be given further consideration, the committee may select one or more of the highest ranking Proposals to move to the next phase. The committee may alternatively choose to bypass any or all subsequent phases and make an award based solely on the evaluation phase.

This RFP asks for responses and submissions from offerors, most of which represent components of the above-criteria. While each criterion represents only a part of the total basis for a decision to award the Contract to an offeror, a failure by an offeror to make a required submission or meet a mandatory requirement will normally result in a rejection of that offeror's Proposal. The value assigned above to each criterion is only a value used to determine which Proposal is the most advantageous to the State in relation to the other Proposals that the State received. It is not a basis for determining the importance of meeting any requirement to participate in the Proposal process.

If the committee does not receive any Proposal that meets all the mandatory requirements, the committee may cancel this RFP. Alternatively, if the committee believes it is in the State's interest, the committee may continue to consider the highest-ranking Proposals despite their failure to meet all the mandatory requirements. In doing this, the committee may consider one or more of the top Proposals, but the committee may not consider any lower-ranking Proposals unless all Proposals ranked above it are also considered, except as provided below.

In any case where no Proposal meets all the mandatory requirements, it may be that an upper ranking Proposal contains a failure to meet a mandatory requirement that the committee believes is critical to the success of the RFP's objectives. When this is so, the committee may reject that Proposal and consider lower ranking Proposals. But before doing so, the committee must notify the offeror of the situation and give the offeror an opportunity to cure the critical mandatory requirement.

If the offeror cures its failure to meet a critical mandatory requirement, its Proposal will continue to be considered. But if the offeror is unwilling or unable to cure the failure, its Proposal may be rejected. The committee then may continue to consider the other remaining Proposals, including, if the committee so chooses, Proposals that ranked lower than the rejected Proposal.

Financial Ability. Part of the Proposal evaluation criteria is the qualifications of the offeror, which includes as a component the offeror's financial ability to perform the Contract. This RFP may expressly require the submission of audited financial statements from all offerors in the Proposal contents attachment. But if the Proposal contents attachment does not make this an express requirement, the evaluation committee may still insist that an offeror submit audited financial statements for the past three (3) years if the committee is concerned that an offeror may not have the financial ability to carry out the Contract.

In evaluating an offeror's financial ability, the weight the committee assigns, if any, to that financial ability will depend on whether the offeror's financial position is adequate or inadequate. That is, if the offeror's financial ability is adequate, the value assigned to the offeror's relative financial ability in relation to other offerors may or may not be significant, depending on the nature of the Work. But if the evaluation committee believes the offeror's financial ability is not adequate, that decision will be a fatal one for the offeror's Proposal, and the committee may reject the Proposal despite its other merits.

Interviews, Demonstrations, and Presentations. The Proposal evaluation committee may require some offerors to interview with the committee, make a presentation about their Proposal, and/or demonstrate their products or services. Such presentations, demonstrations, and interviews provide an offeror with an opportunity to clarify its Proposals and to ensure a mutual understanding of the Proposal's content. The presentations, demonstrations, and interviews will be scheduled at the convenience and discretion of the evaluation committee and will be held at the Rhodes State Office Tower, 30 East Broad Street, Columbus, Ohio 43215. Offerors will be given 48 hours advance notice of the time for such.

The evaluation committee may record any presentations, demonstrations, and interviews.

The evaluation committee normally will not numerically rank interviews, demonstrations, and presentations. Rather, each committee member may decide to revise his or her existing Proposal evaluations based on the interviews, demonstrations, and/or presentations.

Contract Negotiations. The final phase of the evaluation process is contract negotiations. Contract negotiations will be held at the Rhodes State Office Tower, 30 East Broad Street, Columbus, Ohio 43215. Negotiations will be scheduled at the convenience of the committee. The selected offeror(s) must negotiate in good faith.

Negotiations may be conducted with any offeror who submits a competitive Proposal, but the committee may limit discussions to specific aspects of the RFP. Any clarifications, corrections, or negotiated revisions that may occur during the negotiations phase will be reduced to writing and incorporated in the RFP or the offeror's proposal, as appropriate. Any offeror whose response continues to be competitive will be accorded fair and equal treatment with respect to any clarification, correction, or revision of the RFP and will be given the opportunity to negotiation revisions to its Proposal based on the amended RFP. But should the evaluation process have resulted in a top-ranked Proposal, the committee may limit negotiations to only that offeror and not hold negotiations with any lower-ranking offeror. If negotiations are unsuccessful with the top-ranked offeror, the committee may then go down the line of remaining offerors, according to rank, and negotiate with the next highest-ranking offeror. Lower ranking offerors do not have a right to participate in negotiations conducted in such a manner.

Auction techniques that reveal one offeror's price to another or disclose any other material information derived from competing proposals are prohibited. Any oral modification of a proposal will be reduced to writing by the offeror as described below.

Following negotiations, the committee will set a date and time for the submission of best and final proposals by the remaining offeror(s). Best and final proposals may be submitted only once, unless the committee makes a written determination that it is in the State's interest to conduct additional discussions. In such cases, the committee may require another submission of best and final proposals. Otherwise, discussion of or changes in the best and final proposals will not be allowed. If an offeror does not submit a best and final proposal, the offeror's immediately previous proposal will be considered the offeror's best and final proposal.

It is entirely within the discretion of the committee whether to permit negotiations. An offeror must not submit a Proposal assuming that there will be an opportunity to negotiate any aspect of the Proposal.

The committee is free to limit negotiations to particular aspects of any Proposal, to limit the offerors with whom the committee wants to negotiate, or to dispense with negotiations entirely.

The evaluation committee generally will not rank negotiations. The negotiations will normally be held to correct deficiencies in the preferred offeror's Proposal. If negotiations fail with the preferred offeror, the committee may negotiate with the next offeror in ranking. Alternatively, the committee may decide that it is in the interests of the State to negotiate with all the remaining offerors to determine if negotiations lead to an adjustment in the ranking of the remaining offerors.

From the opening of the Proposals to the award of the Contract, everyone working on behalf of the State to evaluate the Proposals will seek to limit access to information contained in the Proposals solely to those people with a need to know the information. They will also seek to keep this information away from other offerors, and the evaluation committee will not be allowed to tell one offeror about the contents of another offeror's Proposal in order to gain a negotiating advantage.

Before the award of the Contract or cancellation of the RFP, any offeror that seeks to gain access to the contents of another offeror's Proposal may be disqualified from further consideration.

Negotiated changes will be reduced to writing and become a part of the contract file open to inspection to the public. The written changes will be drafted and signed by the Contractor and submitted to the evaluation committee within five (5) business days.

If the evaluation committee accepts the change, the Procurement Representative will give the offeror written notice of the committee's acceptance. The negotiated changes to the successful offer will become a part of the Contract.

Failure to Negotiate. If an offeror fails to provide the necessary information for negotiations in a timely manner, or fails to negotiate in good faith, the State may terminate negotiations with that offeror and collect on the offeror's bid bond, if a bid bond was required in order to respond to this RFP.

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APPENDICES

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APPENDIX II	MDOC FORMS
APPENDIX III	REPORTS AND REPORTING FREQUENCIES
APPENDIX IV	STAFFING PATTERN
APPENDIX V	MDOC RESTRICTED MEDICATION LIST
APPENDIX VI	MDOC RECOGNIZED RELIGIONS
APPENDIX VII	LIQUIDATED DAMAGE SCHEDULE

Contracting Manual Questionnaire

Name of primary contact person completing the survey:

Contact person:

Title:

Phone:

Email:

1. Origins of the decision to contract:

A. What was the origin your agency's decision to contract with a private prison company to house state inmates? (Please select one)

a) Department of Corrections

b) Governor's Office

c) Legislators

d) Other sources

Comments: _____

B. Was the Department originally in favor of contracting? **Yes** **No**

C. What was the major impetus for contracting, and to what extent have these goals been realized? (Please rank in order of importance from **1-4**, with **1** being the most important)

a) A response to overcrowding

b) Saving money

c) An alternative to building/operating state run facilities

d) Other: _____

Comments: _____

2. The Request for Proposal

A. What staff played important roles in the development of the RFP or similar preliminary document? Please rank in order of importance from **1-5**, with **1** being the most important)

a) State procurement agency staff (non-DOC)

b) Prison operations specialists

b) Agency counsel

c) Consultants retained by the agency

c) Other: _____

Comments: _____

B. To what extent was your RFP based on RFPs from other jurisdictions, as opposed to being an original document, uniquely developed for your needs? (Please circle one)

Very Much	Much	Somewhat	Little	Very Little
1	2	3	4	5

Comments: _____

C. a) In hindsight, do you believe the RFP process can be improved, and if so, how?

b) What are the strong and weak points of the process you followed?

c) Are there special pitfalls in this phase of the procurement process that others should be watchful for?

3. The Evaluation and Selection Process

A. Describe the process you followed for evaluating proposals. How did it work? Who participated in the process (Please only provide job titles/professional expertise)?

B. If not already provided in documents, what evaluation criteria were used, and how were they weighted?

1) _____
2) _____
3) _____
4) _____
5) _____

C. To what extent was the process conducted primarily by DOC staff / consultants, as opposed to the state procurement agency? (Please circle one)

Very Much	Much	Somewhat	Little	Very Little
1	2	3	4	5

Comments: _____

D. In hindsight, could the evaluation process be improved, and how? Please note strong and weak points of the process. Would you make changes in the evaluation criteria or their weighting? Are there any pitfalls to be wary of?

4. Drafting the Contract

A. Who participated in drafting and negotiating the contract on behalf of the Department (Please only provide job titles/professional expertise)?

- 1) _____
- 2) _____
- 3) _____
- 4) _____
- 5) _____

B. a) How complex were negotiations, or was it relatively simple after the RFP selection process?

Very Complex	Complex	Somewhat Complex	Simple	Very Simple
1	2	3	4	5

Comments: _____

b) If there were difficult issues to resolve, what were they, and could they have been avoided?

C. In hindsight, would you change anything about the drafting and negotiating process? Please note strong and weak points of the process. Are there any pitfalls to be wary of?

5. Overview of the Contracting process

- A. To the extent you have not already addressed it, are there other issues of importance about the contracting process which you feel merit discussion?

Please submit via fax by July 17, 2000 to (860) 704-6420. All responses will be on a “not for attribution” basis and will not identify the source, unless you indicate you want to be identified.

Request for documents:

- If you have contracted for secure prison beds with a private provider within the last three years under a contract in which inmates from your state were the only inmates in the institution operated by the private company, please send a copy of the most recent RFP and contract. (Please note: this includes contracts between you and another governmental entity where that entity has in turn contracted with a private provider to operate a secure correctional facility.)
- If you have contracted for secure prison beds within the last three years under a contract in which the private facility where your inmates were housed also housed inmates from other jurisdictions, please provide a copy of the most current contract or similar document which governs or controls the arrangement. (Please note: this includes contracts with government entities where a private provider ultimately is responsible for the daily operation of the prison.) Additionally, when sending in this information please note what the percentage of the total population of the facility was made up of inmates from your jurisdiction.
- If your agency has policies and procedures or other written guidelines that address contracting with other agencies for the housing of your inmates, please send a copy of such guidelines. (Please note: this request is *not* asking for general contracting or procurement regulations or policies, but only material which relates specifically to contracting for the housing of inmates in other jurisdictions. Additionally, we are not looking for documents pertaining to the traditional housing of small numbers of inmates through interstate compact arrangements.)

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Private Firm Questionnaire

Name of primary contact person completing the survey:

Contact person: _____

Title: _____

Name of Firm: _____

Email: _____

Phone: _____

1. How could the contracting process be improved? (This includes the contractor selection process.)

Comments: _____

2. What steps can a state take to develop an RFP or other solicitation of services that will elicit the best possible responses from private providers? (Please try to be specific as possible.)

Comments: _____

3. What are some positive steps a state can take in drafting and negotiating a successful contract?

Comments: _____

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4. Do you prefer competitive or non-competitive approaches to contracting?
Competitive ☐ Non-competitive ☐
5. Do you prefer contracts that are for building, operating, or building and operating?
Building ☐ Operating ☐ Building and Operating ☐
6. What is a reasonable amount of time for responding to an RFP? _____ (# weeks)
7. How long should the government allow for building and ramping up a facility?
_____ (# months)
8. What type of pricing schemes work best for your company?

9. How much flexibility is appropriate in your company's approach to operating a facility? Do you prefer to follow government procedures or be allowed the flexibility to operate following your own procedures?
Comments: _____

10. To what degree should your company be integrated into the operations of the Department of Corrections? (i.e. training, conferences, intelligence sharing, information systems, etc.)
Comments: _____

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11. Are there any aspects of contracting that you think are mutually beneficial to your company and the taxpayer?

Comments: _____

12. How could the monitoring process be improved?

Comments: _____

13. Do you prefer on-site monitors? Yes ☐ No ☐

14. How many monitors are appropriate per 1000 beds? _____

15. What is the best way for monitors to bring problems to your attention? Should monitors propose solutions?

Comments: _____

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16. How should disagreements between your company and on-site monitors be resolved?

Comments: _____

17. What are some positive steps a state can take in monitoring a private firm's performance?

Comments: _____

18. Other comments/suggestions:

**Please submit via fax by October 2, 2000 to (860) 704-6420.
Thank you for your time and attention.**

PRIVATIZATION RESOURCES

REPORTS

Trustee Report on Youngstown (1998)

<http://www.usdoj.gov/ag/youngstown.htm>

Abt Report examining state of, practice, law and research of private prisons with overview of cost, savings and performance.

<http://www.nicic.org/pubs/prisons.htm>

GAO Review - Comparing Privatization vs. Public Prisons.

<http://www.securitymanagement.com/library/000231.html>

INFORMATION

University of Connecticut's Private Prison Research Site

www.ucc.uconn.edu/~logan/

National Criminal Justice Reference Service

www.ncjrs.org

National Institute of Corrections Information Center

www.nicic.prg/services/info_center

Private Corrections Link

<http://web.crim.ufl.edu/pcp/>

History of Private Prisons

www.crxs.com/history.html

Bureau of Prisons Home Page

<http://www.bop.gov/>

Private Prison Questions/Answers

www.rppi.org/prison/index.html

PRIVATE COMPANIES

Cornell Corrections

www.cornellcorrections.com

Corrections Corporation of America

www.correctionscorp.com/

Correctional Services Corporation

<http://www.correctionalservices.com/index2.html>

Correctional Systems, Inc.

<http://www.crxs.com/>

Wackenhut Corrections

<http://www.wackenhut.com/fr-wcc.htm>

PLEASE NOTE THAT THIS LISTING IS NOT MEANT TO BE COMPREHENSIVE, BUT MEANT TO OFFER VARIOUS VENUES FOR FURTHER INFORMATION ON PRIVATIZATION.

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